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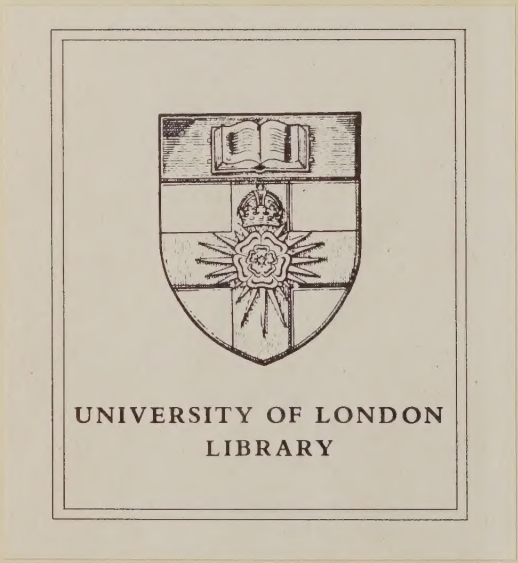

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THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

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Lord Chancellor.

The Right Hon. Lord Ashbourne.

Lords Justices of Appeal.

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The Right Hon. Samuel Walker.
The Right Hon. Hugh Holmes.

Master of the Rolls.

The Right Hon. Andrew Marshall Porter.

Vice-Chancellor.

The Right Hon. Hedges E. Chatterton.

Land Judge.

The Hon. John Ross.

Attorney-General.

The Right Hon. John Atkinson.

Solicitor-General.

Dunbar Plunket Barton, Q.C.

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CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1899.

IN RE CAROLAN AND SCOTT'S CONTRACT.

(1898. No. 388.)

V.-C.
1898.
May 16, 17.

Judgment mortgage—Judgment against one of next-of-kin of intestate—Registration as mortgage against interest in intestate's chattels real—Invalidity of—Power of administrator to sell notwithstanding—13 & 14 *Vict. c.* 29.

The right of a next-of-kin to a share of the personal estate of an intestate, consisting in whole or in part of chattel interests in lands, is not such an estate or interest in the lands as is capable of being attached by a judgment mortgage under 13 & 14 Vict. c. 29, sects. 6, 7.

SUMMONS under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).

By agreement dated the 31st December, 1897, Hugh J. Scott agreed to buy from Nicholas Carolan, subject to certain conditions, a plot of land called the Flush Farm, held under a lease dated the 13th September, 1856, from William Montgomery to James Carolan, jun., for 3000 years.

Condition 5 provided amongst other things:—The vendor is

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selling as administrator *de bonis non* of the said James Carolan, jun., and the concurrence of the persons beneficially interested shall not be required; and the vendor shall not be required to enter into any covenant other than the implied statutory covenant against incumbrances.

The following were the facts with respect to the title:—James Carolan, jun., died on the 2nd February, 1877, intestate, leaving as next-of-kin two brothers, the vendor and Charles Carolan, two sisters, Elizabeth Lawlor and Ellen Carolan, and children of a deceased sister.

On the 31st March, 1879, letters of administration were granted to Ellen Carolan. She died on the 6th January, 1896, leaving part of the personal estate unadministered, and on the 9th October, 1896, letters of administration *de bonis non* were granted to the vendor.

On a registry search being made, it appeared that William Fitzpatrick, on the 1st November, 1878, recovered a judgment in the Exchequer Division of the High Court against the vendor and the said Ellen Carolan, and on the 4th January, 1879, purported to register the same under the Judgment Mortgage Act (13 & 14 Vict. c. 29) as a mortgage against their interests in the lands.

William Fitzpatrick died on the 21st July, 1892, having made a will, probate of which was granted to Acheson Ferguson on the 31st August, 1892.

No payment had been ever made on foot of the said judgment, nor acknowledgment given with respect to same by the vendor, nor, so far as he was aware, by Ellen Carolan.

The purchaser declined to complete while the judgment mortgage remained, and Acheson Ferguson refused to execute the conveyance or release the lands unless he was paid the judgment debt. See further the arguments of counsel *infra*.

This was a summons by the vendor for an order declaring that the judgment mortgage was not then raisable out of the premises; that Acheson Ferguson was not entitled to be paid the judgment debt out of the purchase money; that notwithstanding the judgment mortgage, the vendor had power to assign and make title to the premises; and that the objections of the purchaser to the title had been sufficiently answered.

The summons was served on the purchaser, and on Acheson Ferguson.

Hume, for the vendor:—

There are three answers to the purchaser's objections. First, Ellen Carolan had not such an estate or interest in the lands as could be captured by the registration of an affidavit under the Judgment Mortgage Act. The creditor's affidavit must specify the lands sought to be affected, and the result of the registration is to transfer to him only the estate and interest of the debtor in those lands: see sections 6, 7. But a next-of-kin has no specific interest in any of the leasehold lands of the intestate, his right is to have the estate administered, and a judgment against him cannot be converted into a mortgage against the chattels real: *Thomas* v. *Cross* (1); *In re Rae's Estate* (2); *Irish Land Commission* v. *Davies* (3). Secondly, the judgment creditor—assuming that he obtained a valid charge on the interest of Ellen Carolan—could be in no better position than if she had assigned to him her interest (see section 7); and an administrator can make good title to a chattel interest without the concurrence of the next-of-kin or their assignees. Here, as a considerable time had elapsed since the death, condition 5 was inserted, and that precludes the purchaser from making the objection. Moreover, the purchaser never required the concurrence of the other next-of-kin—he seeks to place the judgment creditor in a higher position than they occupy. Thirdly, the Real Property Limitation Act, 1874 (37 & 38 Vict c. 57) section 8, is a bar to any claim under the alleged judgment mortgage. Even if it were a mortgage by deed all remedies would be gone: *Sutton* v. *Sutton* (4); a title under the statute will be forced on a purchaser—not only is the remedy gone, but the estate is extinguished: see Dart, Vendors and Purchasers (6th Ed.), 462, 463; *Bolling* v. *Hobday* (5).

Watts, for the purchaser:—

All the purchaser knows is that the search discloses a judgment registered as a mortgage against the lands—that judgment

(1) 2 Dr. & Sm. 423.
(2) 1 L. R. Ir. 174.
(3) 27 L. R. Ir. 334.
(4) 22 Ch. D. 511.
(5) 31 W. R. 9.

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having been recovered against two of the next-of-kin, each of whom became, and one of whom is still, personal representative of the intestate. The registration was effectual against the interests of the judgment debtors, and could be enforced when administration was obtained: *Mullane* v. *Ahern* (1). If Ellen Carolan obtained a title by possession the entire leasehold interest would have been bound: *Hamill* v. *Murphy* (2). As to the limitation act, there is no proper evidence to support that ground of objection to the judgment mortgage. Moreover, more than twenty years have elapsed since the death of the lessee; the residuary accounts show that the sale is not for the purpose of paying debts, it is avowedly not for the purpose of paying the judgment debt; the administrator has no power to sell, and condition 5 does not preclude the purchaser from making this objection: *In re Molyneux and White* (3). Here there was a period of over twenty years between the death and the contract for sale, which was not the case in *In re Whistler* (4).

M'Ilroy, for Acheson Ferguson:—

Acheson Ferguson should not have been brought before the Court. The summons asks for a declaration that he has no rights, but he is a stranger to the contract, and cannot be made a party to or be bound by a decision on a summons brought under the Vendor and Purchaser Act. His name should be struck out of the summons.

Hume, in reply:—

The objection that twenty years have elapsed since the death of James Carolan, and that his personal representative has now no power to sell was never made until now: further, if there were any force in that objection, the concurrence of the other next-of-kin would be necessary; but the purchaser never made any requisition as to them. Though the summons was served on Acheson Ferguson he need not have appeared.

May 17.

The Vice-Chancellor:—

This question arises on an agreement for sale by the administrator *de bonis non* of a person who died intestate in 1877, the objec-

(1) 28 L. R. Ir. 105.
(2) 12 L. R. Ir. 400.
(3) 13 L. R. Ir. 382, 390; 15 L. R. [Ir. 383.
(4) 35 Ch. D. 561.

tion being that on the search in the Registry of Deeds it appeared that a judgment had been registered as a mortgage against certain lands which were assets of the intestate. That judgment was against one of the next-of-kin, and it is contended that the registration of it constitutes a ground of objection which justifies the purchaser in refusing to accept the title. I am of opinion that the right of a next-of-kin to a share of the personal estate of an intestate consisting in whole or in part of chattel interests in lands is not such an estate or interest in the lands as is capable of being attached by a judgment mortgage under the Act. A judgment mortgage attaches merely on the estate or interest of the judgment debtor in the lands or hereditaments sought to be charged, and a next-of-kin who is entitled under the Statute of Distributions to a share of the personal estate has not any such estate or interest in the chattels real comprised in the personal estate as would enable a judgment against him to be registered as a mortgage upon it.

In the next place, I am of opinion that a purchaser from a next-of-kin cannot ordinarily stand in a higher position than the next-of-kin himself, and it is not the law that an administrator is obliged to obtain the concurrence of the next-of-kin before he can dispose of the estate of his intestate. I do not say that there may not be special circumstances rendering such concurrence necessary; but none such exist here, and, as a general rule, an administrator can sell without the assent of the next-of-kin, and I am of opinion that a person having registered a judgment as a mortgage against a next-of-kin, even if it were otherwise valid, could not be in a better position than the next-of-kin in this respect.

As to the Statute of Limitations, I do not think it necessary to say anything. I decide the case on the first two grounds.

I think Mr. M'Ilroy's client should not have been made a party to the proceedings, and he is entitled to have his name struck out. The present is not a proceeding to decide adverse claims to the estate.

Solicitors for the vendor: *Clarke & M'Cartan.*

Solicitors for the purchaser: *C. & J. Black.*

Solicitors for Acheson Ferguson: *L'Estrange & Brett.*

D. M'C. M.

V.-C. 1898. March 7. *Appeal.* May 13, 14.

IN RE MARIA POWER'S POLICIES (Nos. 13,975, 13,989), EFFECTED WITH THE GUARDIAN FIRE AND LIFE ASSURANCE CO.; AND IN THE MATTER OF THE LIFE INSURANCE COMPANIES (PAYMENT INTO COURT) ACT, 1896.

(1898. No. 544.)

Policies of insurance—Mortgage—Puisne mortgagee—Payments by the puisne mortgagee to keep up the policies—Salvage claim—Paramount lien—Insurance Company—Lodgment of money in Court—Payment into Court Act, 1896 (59 & 60 *Vict. c.* 8, *s.* 3)—*Costs.*

In 1872 the owner of two policies of assurance on her life mortgaged the same, along with an annuity and certain sums of money charged upon lands, to Mrs. H. to secure the sum of £1700. In 1877, K. who was the agent of the mortgagor and solicitor for both mortgagor and mortgagee, took a puisne mortgage of the policies to secure some advances made by him, to the mortgagor. The lands on which the annuity and charges were secured were evicted for non-payment of rent and the policies thus became the only security for the loan. The mortgagor ceased paying the premiums on the policies, and the same were paid by K., who did not for some years inform Mrs. H. of the fact. In 1888 he wrote first saying, that he had been paying the premiums for her benefit, but not stating that he was himself a mortgagee. She replied, repudiating the idea that she had ever given him any authority to pay the premiums. K. answered that he had no objection to continue paying the premiums, and to be reimbursed for the same out of the policy moneys. Mrs. H. made no reply to this letter. The mortgagor died in the year 1896, and K. and his representatives continued paying the premiums down to her death. The Insurance Company paid the money into Court under the Payment into Court Act. *Held*, by the Vice-Chancellor, that K. was entitled to a salvage claim or lien upon the policy moneys, in priority to Mrs. H.'s mortgage for the premiums paid by him, and interest thereon:—

Held by the Court of Appeal (varying the decision of the Vice-Chancellor), that K. was only entitled to a lien in such priority for the premiums paid by him, and interest thereon, after the date of the correspondence.

Leslie v. *French* (23 Ch. D. 552), considered and discussed.

Held by the Vice-Chancellor, that the Insurance Company was not entitled to any costs of lodging the money in Court under the Payment into Court Act 1896 (59 & 60 Vict. c. 8, s. 3).

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Motion, on behalf of Mrs. Ellen Hearne, for an order directing the Accountant-General to pay out to her the sum of £1800, representing the amount of two policies of insurance on the life of Mrs. Maria Power, deceased, which she had assigned to her by way of mortgage.

It appeared that the late Mrs. Power on the 21st June, 1872, effected a policy of insurance on her life with the Guardian Assurance Company, for the sum of £1200, subject to the annual premium of £55 15*s.* Subsequently, on the 15th July, 1872, she effected a further policy on her life with the same Company for £600, the annual premiums being £29. By two indentures dated the 10th and 16th July, 1872, respectively, Mrs. Power assigned by way of mortgage to Mrs. Hearne (the present applicant), these two policies of assurance along with an annuity and certain moneys charged upon lands, as security, for the sum of £1700, together with interest at the rate of 6 per cent., and covenanted with the mortgagee to pay all sums of money necessary for keeping on foot the policies of insurance thereby assigned. On the 8th March, 1877, Mrs. Power executed a second mortgage of the same two policies to Mr. Pierse Kelly, who was acting as her solicitor at the time. During the mortgagor's lifetime, in the year 1888, the charges on land included in the mortgage became valueless by reason of the eviction of the lands on which they were secured. The mortgagor had allowed the premiums to fall into arrear, and Kelly paid them as they fell due from and after the year 1882, but without any intimation of the fact to the prior mortgagee, until, in the year 1888, the following correspondence took place between the parties.

The first letter was from Kelly to Mrs. Hearne; it was as follows:—

Cathedral-square, Waterford,
19*th July*, 1888.

Hugh Power's Estate.

Dear Mrs. Hearne,—The two policies of insurance on Mrs. Power's life which you hold as security for your loan amount to £1200 and £600.

In order to keep them alive for your benefit, I have already advanced £513 out of my own pocket—but there will be a further premium of £55 15*s.* due on the 21st inst., on the £1200 policy and £29 on the policy for £600 on the

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15th August. As I have already advanced so much by way of salvage for your benefit, I think you should pay these two premiums yourself.

However, if it is any inconvenience for you to do so, I will pay the amount myself on your account.

Yours faithfully,

Mrs. Hearne. Pierse Kelly.

Mrs. Hearne replied :—

Bellevue-terrace, Tramore,
August 16*th*.

Dear Mr. Kelly,—In reply to your letter relating to Mr. Hugh Power's Estate, I am surprised to have it stated that you advanced £513 for my benefit. I certainly did not ask you to do so, and as I have already suffered very considerably by non-payment of my principal and interest, I cannot advance any money for premiums or hold myself responsible for their payment in any way. I will ask my own son to call on you, as I feel very much dissatisfied at the position of this matter which I entered into by your advice. Apologising for not answering your letter sooner,

I remain, yours faithfully,

E. Hearne.

Kelly replied thus :—

Cathedral-square, Waterford,
August 16*th*, 1888.

Dear Mrs. Hearne,—I received your letter of the 16th inst. this evening, and think you must have misunderstood my letter of the 19th ulto. I did not mean by it that I had any demand against yourself personally for my advances to keep up the policies on Mrs. Power's life for your benefit. I only intended to convey that the policies on Mrs. Power's life were liable to me for that amount, as had I not adopted the course I did the policies would have been allowed to drop, which event would have caused you a very considerable loss.

Under these circumstances I have no objection to keep up the policies, being of course reimbursed out of the proceeds the amount of my advances as a salvage claim, but not having any claim against you personally for the amount thereof.

Yours faithfully,

Pierse Kelly.

Mrs. Ellen Hearne,
Bellevue-terrace, Tramore.

It was also stated in affidavits filed on behalf of Mrs. Hearne that Pierse Kelly had acted as solicitor for the mortgagor and mortgagee, and that he was also the agent for the said Maria Power. It also appeared that Mr. Kelly was agent for Hugh Power,

the mortgagor's son, on whose lands the mortgaged annuity and charges were secured. These statements were not contradicted in the affidavits filed on behalf of the representatives of Mr. Kelly. But it was contended that the agency must be taken to have ceased when a receiver was appointed over the lands in the year 1884. The mortgagor died on the 29th of January, 1896. Mr. Kelly had died previously.

In pursuance of the provisions of the Act of Parliament 59 & 60 Vict. c. 8, s. 3, entitled "An Act to enable Assurance Companies to pay money into Court in certain cases" (Payment into Court Act, 1896), the Insurance Company lodged £1800, being the amount of the two policies in Court.

By a cross notice of motion the representatives of Mr. Pierse Kelly claimed to be entitled, as salvage creditors, to be paid out of the fund in Court the sum of £1598, being the amount of the premiums paid by Mr. Pierse Kelly, together with interest thereon, in priority to the first mortgagee, Mrs. Ellen Hearne.

Matheson, Q.C. (with him *Theodore Ryland*), for Mrs. Ellen Hearne:—

Mrs. Power covenanted with the first mortgagee to pay the premiums out of her own pocket necessary to keep up the policies. Nothing that was done by her could ever entitle her to a salvage claim for paying those premiums. She being bound by that covenant, assigned by way of mortgage to Mr. Pierse Kelly. We submit that she could not put Mr. Kelly in a better position than she was in herself; and if Mrs. Power could make good no claim, he cannot do so, because he took subject to all prior liabilities, including the liability to keep up the policy. If it was possible for her mortgagee to secure a salvage claim, all that a mortgagor, who had entered into a covenant to pay premiums, would have to do, would be to make a second mortgage to a friend, and thereby get rid of the liability to pay premiums on the covenant, and place them in priority to the debt of a first mortgagee.

In the case of a mortgagee paying premiums to keep up a policy, the true rule was to add the money so expended to his charge: *In Re Leslie, Leslie* v. *French* (1).

(1) 23 Ch. D. 552.

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O'Connor, Q.C., for the representatives of Pierse Kelly.

If any money was paid by Pierse Kelly to keep up the policies, he was clearly entitled as salvagor to a paramount lien in respect of sums so expended.

As regards the class of persons who cannot maintain a salvage claim the fundamental rule is, that a mere third person who voluntarily makes a payment by which an estate or interest is preserved for the benefit of the person interested therein cannot claim a lien for money so paid: *O'Loughlin* v. *Dwyer* (1). Nor can a mere owner of an ultimate equity of redemption: *Falcke* v. *The Scottish Imperial Insurance Company* (2).

A mortgagee, however, is clearly entitled to establish a salvage claim, *In Re Leslie, Leslie* v. *French* (3); where the other classes of persons so entitled are enumerated. Mr. Kelly being a mortgagee, was unquestionably in the position of salvagor, in respect of the money paid by him to keep up the policies, and that being so his representatives have clearly a right to be paid the amount so expended in priority to all other incumbrances on the property. They are also entitled to interest.

J. W. Richards, for the Insurance Company:—

We ask for the costs of lodging the amount of the policies in Court under the "Payment into Court" Act, 1896, 59 & 60 Vict. c. 8, s. 3. No rules of procedure under that Act have been framed in Ireland; but these costs should be dealt with as costs under the Trustee Relief Act, or under the Trustee Act of 1893.

Theodore Ryland, in reply:—

It is perfectly clear that, whatever payments were made by Pierse Kelly, were for his own benefit alone. The first payment was made in 1882, but it was not until 1888 that Mrs. Hearne received any notice.

In Ireland where an owner in fee makes a lease, if the lessee does not pay the rent, a sub-lessee can do so, to prevent his interest being evicted. He has a claim as against his own lessor for money so paid, but not as against the owner in fee. Similarly Pierse

(1) 13 L. R. Ir. 75. (2) 34 Ch. D. 234. (3) 23 Ch. D. 552.

Kelly had a full claim as against the mortgagor, but not as against the interest he had already parted with.

The maritime doctrine of salvage does not apply to cases of contract: *Falcke* v. *The Scottish Imperial Insurance Company* (1).

THE VICE-CHANCELLOR:—

I must hold that the representatives of Pierse Kelly have clearly established their position as salvagors. Their right to become so is founded on their position as mortgagees. There was a prior mortgage, and their claim is in respect of a second mortgage. The only question in the case is, whether they are entitled to be paid the salvage money advanced by P. Kelly in priority to the first mortgagee. In all the cases cited before me the question was, whether persons making a salvage claim were, by reason of a sufficiency of interest in a position to do so, and not as to the priority of their claim. I have always understood the law to be, that where a salvagor establishes his right to be treated as such, it entitles him to priority over all other incumbrancers.

The next question raised was whether they are entitled to interest on the money so expended. I have no doubt that they are. I therefore hold the representatives of Pierse Kelly entitled to interest at the Court rate of 4 per cent. as a first charge on the fund in Court. As to the other question, whether the Insurance Company are entitled to their costs of lodging the money in Court, I must hold they are not so entitled. There have not been any General Orders made in Ireland under the Act, but in those made in England such costs are disallowed, and I shall follow the principle of the English Orders.

I declare the parties entitled to their costs of this matter out of the fund in Court, the Company to bear their own costs of bringing in the money.

J. MAC M.

(1) 34 Ch. D. 234.

Appeal. 1898.

In re Power's Policies.

May 13, 14.

Mrs. Hearne appealed to the Court of Appeal (Lord Ashbourne, C.; Fitz Gibbon and Holmes, L.JJ.).

Serjeant Campion, Q.C., and *Matheson, Q.C.*, for the appellant:—

The position which Pierse Kelly occupied towards Mrs. Power as her solicitor and agent, renders it plain that any premiums which he paid prior to the correspondence were paid by him as her agent, for and on her behalf. He made no communication to his client, Mrs. Hearne, as to the premiums being in arrear, until he wrote the letter of 19th July, 1888. In that letter he suppresses the fact that he was himself a mortgagee: he claims that he made the advances for Mrs. Hearne's benefit. She at once wrote repudiating ever having given Kelly any authority to make these payments.

Kelly's representatives cannot have a claim on the policy moneys in priority to Mrs. Hearne's charge by reason of payments of premiums made without her request, and without her authority. Any claim he has to be recouped for his payments must come in the same priority as his own charge. In *In re Leslie* (1), Fry, L.J., states the only four cases in which a lien can be created on policy moneys by payment of premiums: those cases are—(1) "By contract with a beneficial owner of the policy. (2) By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation. (3) By subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property. (4) By reason of the right vested in mortgagees, or other persons having a charge upon the policy, *to add to their charge* any moneys which have been paid by them to preserve the property." The payments made by Kelly and his representatives fall within the fourth class, and the only right which they have is "to add" these payments to their claim on their mortgage: the judgment appealed from is wrong in treating these payments as a paramount charge. There is no case in which a *puisne* mortgagee has been allowed to claim for such payments in priority to a prior mortgagee of the policy. On the contrary, *In re Leslie* (1) has been approved

(1) 23 Ch. D. 552, at p. 560.

of in *Falcke* v. *Scottish Imperial Insurance Company* (1), where the notion of treating payments such as those made by Kelly as "salvage" payments is repudiated (see p. 248, per Bowen, L.J., and p. 254 per Fry, L.J.). North, J., says in *In re Earl of Winchelsea's Policy Trusts* (2):—"The principles enunciated by Lord Justice Fry in *In re Leslie* (3) were in substance adopted by the Court of Appeal in *Falcke* v. *Scottish Imperial Insurance Company* (1), and I think the Court intended to lay down exhaustively all the cases in which a person not the sole beneficial owner of a policy, who pays a premium in respect of it, is entitled to a lien upon the proceeds of the policy for the amount which he has paid." In this country the law is the same. Moore, J., says, in *Fetherstone* v. *Mitchell* (4), speaking of a *puisne* mortgage:—"The right which he has as a salvage creditor he only possesses as incidental and accessory to his principal demand."

The cases in which salvage payments have been given priority in case of mortgages of land are different: there is a personal liability here to keep up and preserve the mortgaged property. After Mrs. Power mortgaged the policies to Mrs. Hearne she retained in herself only an equity of redemption, clogged with a continuous liability to keep up the policies. She assigned this equity of redemption to Kelly. How can her assignee gain a priority free from this continuous liability? If Kelly had informed Mrs. Hearne of the true state of affairs in 1888, she could have obtained from the Insurance Company the surrender value of the policy which at that time would have exceeded the amount she gets under the order of the Vice-Chancellor. So far therefore from the payment of the premiums being "for her benefit," the result has been the reverse.

O'Connor, Q.C., and *G. Green*, for the respondents:—

The Courts in Ireland have always recognised the principle that salvage advances made by a puisne mortgagee are entitled to be ranked higher than the incumbrance of the person making them: *Kelly* v. *Staunton* (5); *Fetherstone* v. *Mitchell* (4); *Locke* v.

(1) 34 Ch. D. 234.
(2) 39 Ch. D. at p. 172.
(3) 23 Ch. D. 552.
(4) 11 Ir. Eq. R. at pp. 45, 47.
(5) 1 Hogan, 393.

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Evans (1); *Hamilton* v. *Denny* (2); *Warnock* v. *Leslie* (3). It was not necessary for the decision of *In re Leslie* (4) that Fry, L.J., should lay down his 4th proposition; neither was the matter before the Court in *Falcke* v. *Scottish Imperial Insurance Co.* (5). Lindley, L.J., has doubted whether the propositions in *In re Leslie* are exhaustive, *Strutt* v. *Tippett* (6). When Kelly paid these premiums he was mortgagee, and he made the payments with his own money; the inference in law is that he made the payments as mortgagee. He can have made no payment as agent for the mortgagee after 1884, when the receiver was appointed over the lands. In any event, after the correspondence in 1888, it is plain that the payments were made by Kelly and his representatives as mortgagees. Since 1888 the payments made by Kelly come within Lord Justice Fry's first proposition, on the ground that they were made by Kelly at the implied request of Mrs. Hearne. Mrs. Hearne acquiesced in Kelly's paying the premiums, and cannot now say that they were not made for her benefit.

Serjeant Campion, Q.C., in reply:—

The evidence shows that prior to the correspondence the premiums were paid by Kelly as agent for the mortgagor; no salvage claim lies in respect of such payments. After the year 1888 Kelly had no interest in the policy, as the moneys payable under it would be insufficient to meet the claim of Mrs. Hearne which was prior to his mortgage. After that date Kelly's only interest was to be recouped the money which he had previously paid as agent, and in respect of which he had no lien or salvage right. The appellant did not know that the premiums were being paid by Kelly until he told her. She is, therefore, not barred from her claim by aquiescence, for acquiescence does not exist until there is knowledge. The respondent bases his claim on contract since the last letter in the correspondence. But the mere silence of the appellant after that letter cannot give him any such right. *Hamilton* v. *Denny* (2) was discussed and distinguished in *In re Leslie* (4).

(1) 11 Ir. Eq. R. 52.
(2) 1 Ball & Beatty, 199.
(3) 10 L. R. Ir. 68.
(4) 23 Ch. D. 552.
(5) 34 Ch. D. 234.
(6) 62 L. T. (N. S.) 475.

Kelly v. *Staunton* (1) was a case between mortgagor and mortgagee; there was privity of contract there.

Appeal. 1898.

In re POWER'S POLICIES.

May 14.

LORD ASHBOURNE, C.:—

In this case the facts are few and not complicated, and the issues which arise out of them are clear. In 1872 Mrs. Power effected two policies of assurance on her life, one for £1200, the other for £600. Shortly afterwards she mortgaged these two policies along with other property—charges on land—to the appellant, Mrs. Hearne, to secure an advance of £1700. In the fulness of time Mrs. Power died, and the two policies became payable. Mrs. Hearne, the mortgagee, claims that she is entitled to the entire proceeds of the two policies (£1800), which is not sufficient to discharge the total sum due upon her mortgage, for principal and interest, amounting to £2313. Her claim is met by a rival demand made by the representatives of Mr. Pierse Kelly (who had a puisne mortgage on the policies) to be recouped the amount of the premiums paid by him to preserve the policies.

There is no controversy as to the sum due on Mrs. Hearne's mortgage, nor as to the respective priorities of the two mortgages. The only question is as to how far the priority of Mrs. Hearne's mortgage is displaced by the payments made by Mr. Kelly in respect of the premiums on the policies. The claim put forward by the widow of Mr. Kelly amounts to £1598, which represents the payments, together with interest, made by him in respect of the premiums from the year 1882 to Mrs. Power's death, and which, as the respondents assert, constitutes, under the circumstances of the case, a first charge upon the proceeds of the policies.

In order to determine to what extent the respondents' claim can be sustained, it is essential to understand the position which Mr. Kelly occupied when he commenced to pay these premiums. He had been solicitor for both parties, mortgagor and mortgagee, at the time when Mrs. Power mortgaged these policies to Mrs. Hearne, and he continued to be solicitor for both parties at least down to the year 1888, as appears by the evidence in the case, and possibly down to the time of his death. Besides being solicitor of

(1) 1 Hogan, 393.

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both parties he also had a puisne mortgage on the policies made in the year 1877, to secure a loan of originally £500, which was largely increased by subsequent advances. In the year 1882 Mr. Kelly became invested with an additional character, being appointed agent to the mortgagor; and thus at the time he made the first payment (July, 1882) we find him occupying three different positions:—1, Solicitor to mortgagor and mortgagee; 2, himself a puisne mortgagee; and, 3, agent to the mortgagor.

From 1882 to 1888 no change in the condition of affairs took place. Mrs. Hearne was paid no interest on her mortgage during these years. It appears that all she got at any time was a sum of £20. She asked no question apparently as to how the policies were being kept up. She heard nothing from her solicitor, Mr. Kelly, at whose advice she made the loan, to show her that the security of the policies was in danger. The strain of keeping them up did not fall upon her as long as the mortgagor kept them up. She had no notice of the puisne mortgage which Mr. Kelly had taken, nor did she know that he was paying the premiums.

Matters entered upon a new phase in 1888. Kelly's position had become somewhat altered, the relation of agent and principal previously existing between him and the mortgagor had been modified by the appointment of a receiver a few years before, and about the year 1888 the property other than the policies included in the mortgage had ceased to exist owing to the eviction of the lands for non-payment of the head rent. From this time forward, therefore, the sole security for the loans made by Mrs. Hearne and Mr. Kelly were the two policies of assurance. In this state of affairs a correspondence took place between the two mortgagees which in my opinion forms the cardinal point of the case.

On July 19th, 1888, Mr. Kelly wrote as follows:—

HUGH POWER'S ESTATE.

DEAR MRS. HEARNE,—The two policies of insurance on Mrs. Power's life which you hold as security for your loan amount to £1200 and £600. In order to keep them alive for your benefit I have already advanced £513 out of my own pocket, but there will be a further premium of £55 15*s.* due on the 21st inst., on the £1200 policy, and £29 on the policy for £600 on the 15th August. As I have already advanced so much by way of salvage for your benefit I think

you should pay these two premiums yourself. However, if it is any inconvenience for you to do so, I will pay the amount myself on your account.

Yours faithfully,

PIERSE KELLY.

I make no hostile comment on this letter. But its whole exordium shows that the writer thought it necessary to inform Mrs. Hearne of the state of affairs. It negatives any supposition that she knew that the premiums had previously been paid by any one except the mortgagor. It contains no reference to the fact that Mr. Kelly was himself a puisne mortgagee, and so far from suggesting that he had paid the premiums since 1882 in virtue of this character, it claims that he had made those payments for the benefit of Mrs. Hearne. The letter, however, was a plain intimation that the one premium would fall due in a day or two, and that the second would fall due upon August 15th.

Mrs. Hearne saw the importance of the letter and the situation. She took time to consider, and on the 16th August, the day after the second premium had fallen due, she wrote a most sensible, business-like reply :—

DEAR MR. KELLY,—In reply to your letter relating to Mr. Hugh Power's estate, I am surprised to have it stated that you advanced £513 for my benefit. I certainly did not ask you to do so, and as I have already suffered very considerably by non-payment of my principal and interest, I cannot advance money for premiums or hold myself responsible for their payment in any way. I will ask my own son to call on you as I feel very much dissatisfied at the position of this matter which I entered into by your advice. Apologising for not answering your letter sooner,

I remain, yours faithfully,

E. HEARNE.

That letter assumes no personal responsibility or liability, but it says nothing to check or repudiate—I take that to be the meaning of the letter—any payment which Mr. Kelly might think it necessary to make. Mr. Kelly replied promptly :—

August 16*th*, 1888.

DEAR MRS. HEARNE—I received your letter of the 16th instant this evening, and think you must have misunderstood my letter of the 19th ulto.

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I did not mean by it that I had any demand against you personally for my advances to keep up the policies on Mrs. Power's life for your benefit. I only intended to convey that the policies on Mrs. Power's life were liable to me for that amount, as had I not adopted the course I did, the policies would have been allowed to drop, which event would have caused you a very considerable loss.

Under these circumstances I have no objection to keep up the policies, being of course reimbursed out of the proceeds the amount of my advances as a salvage claim, but not having any claim against you personally for the amount thereof.

Yours faithfully,

Pierse Kelly.

These three letters mark the dividing line which separates the different equities that attach to the several payments of premiums made by Mr. Kelly. The onus is cast upon the representatives of Mr. Kelly to show that he gave Mrs. Hearne notice of the danger in which the policies were before he made the payments in respect of which the advantage now claimed is sought. When he made the payments prior to these letters he was agent and solicitor for the mortgagor besides being mortgagee. No doubt, he made the payments with his own cheque, and (as the Chief Clerk has found) out of his own moneys. But he did not make them in such a way as to bring home to the prior mortgagee the danger in which the security was placed unless he paid the premiums. She might well have assumed, if she had heard that he was paying the premiums, that he was doing so as the agent of the mortgagor.

After the first letter, however, no such assumption could be made. It gave distinct notice that the mortgagor had no funds to keep the policies alive; and that if the security was to be maintained provision must be made for the premiums which were about to fall due. I think it would be contrary to all fairness and equity not to give Mr. Kelly a right of salvage for the payments made after the date of that first letter.

I gather from the authorities that the term "salvage payments" is not wholly acceptable in England. But from the time of Lord St. Leonards it certainly has been used in this country. It makes little matter by what name such payments are to be called. The principle is that a Court of Equity gives a paramount lien on a fund to a person with an interest in respect of payments

made by him to preserve the fund with the knowledge of the other parties interested therein.

The effect of the judgment of this Court being to cut down the number of payments in respect of which the lien is awarded to Mr. Kelly's representatives, we give no costs of the appeal.

FITZ GIBBON, L.J.:—

We decide this case upon inferences of fact, which must be accurately stated. The leading fact, which was the origin of all the trouble, was that Mr. Kelly acted as solicitor for opposite parties, mortgagor and mortgagee, and the difficulties of this position —so often the cause of disaster—were intensified by his having a personal interest as a puisne mortgagee. He also filled another character, which goes far to explain what went on between the date of Mrs. Hearne's mortgage and the first of his letters. He "acted as agent of Hugh Power from February 15, 1881, down to the appointment of the Receiver in 1884." Mr. O'Connor and Mr. Green urged that any liability which could be thrown upon Mr. Kelly by reason of this agency must end in 1884. But that date did not mark the termination of the relation of principal and agent between Mr. Kelly and the mortgagor, and the effect, if any, of the "appointment of the Receiver" upon that relation does not appear. The security given to Mrs. Hearne for her loan of £700 consisted of a transfer of a mortgage of Mrs. Power's jointure of £400 a year issuing out of certain lands; a mortgage given, by way of collateral security, by her son, Mr. Pierce Power, of a sum of £2000 charged upon the same lands; and a mortgage of the policies, the proceeds of which are now in Court. It does not appear that the lands belonged either to Mrs. Power or her son, nor do we know how, by whom, or over what estate, the Receiver was appointed. Mr. Kelly acted for the jointress and her son in preparing the mortgage, and presumably, whether a Receiver was appointed over the lands or not, the rents were applicable to pay the jointure and the interest on the charge. Whether Mr. Kelly was agent over the lands or not, so long as he acted for Mrs. Power and her son, he had the same duty towards them, and towards his other client, Mrs. Hearne, their mortgagee.

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I am careful to draw no inference of fact against Mrs. Kelly's claim, which Mr. Kelly's own writing does not warrant, but I can not relieve her, as his representative, from any presumption or *onus* of proof which the law would throw upon him if he were still living. Reading his first letter by the light of the facts that he had been agent over the lands, and was the solicitor for both parties to the mortgage, and that he did not let Mrs. Hearne know that he was a puisne mortgagee, I draw the conclusion, from the language of the letter, that it was the first intimation to Mrs. Hearne, and that Mr. Kelly believed that she had no previous knowledge, that he had been paying the premiums out of his own money. Up to that time, therefore, she was justified in assuming that the mortgagors were paying the premiums as they were bound to do. Up to that point, I ask, what were the legal rights and liabilities, and what were the equities, in respect of the payments made by Mr. Kelly? A mortgagee had taken a policy as security for a loan, by the advice of her solicitor, who was, to her knowledge, acting for the mortgagors also. The mortgagors were bound to pay the premiums. Several years after the mortgage was effected, the solicitor, without any previous communication on the subject, told the mortgagee that for six years he had been paying the premiums "for her benefit." Such payments could not be recovered at law, for there was no evidence of any request of the mortgagee, express or implied. If Mr. Kelly had really made these payments on behalf of his client, the mortgagee, *i.e.*, with the intention of looking to her for their repayment, or in the belief that she would repay them, he was a mere volunteer, and though it, under some circumstances, might be an ungracious thing to repudiate payments so made, there could be no legal claim to recover them. Having regard to the fact that the policies were little more than sufficient to repay Mrs. Hearne's principal, there cannot, at the beginning, have been any intention in Mr. Kelly's mind of looking to the policies themselves, as distinguished from Mrs. Hearne personally, for repayment, and I draw the inference that he did not tell her how badly her security was likely to turn out, so long as he had any hope that she would not lose her money. It was only natural that she should repudiate liability for payments made without her knowledge, for which she was not liable, which ought to have been made by others,

and which she was entitled to assume, during the six years, were being made by or on behalf of the mortgagors, who were Mr. Kelly's clients as much as she was, and to whom she had lent her money on his advice. If the first payment in 1882 was really made on Mrs. Hearne's account, and if Mr. Kelly had then told her of it, she might have surrendered the policies, or might have done something, either to call in her loan or to put pressure upon the mortgagors, or possibly she might have made Mr. Kelly answerable for lending her money on bad security. Mr. Kelly's first letter indicates no recognisable ground, at law or in equity, for making Mrs. Hearne liable for the payments made before its date, nor for charging them upon her interest in the policies under the security which Mr. Kelly had negotiated for her. I go farther, I think that the letter, taken in connection with the other circumstances, leads to the conclusion that the payments had been made on behalf of the mortgagors, and not of Mrs. Hearne. There are two leading facts—(1), Mr. Kelly's first payment of the premiums was made in 1882, immediately after he became Mr. Power's agent, and—(2), his first communication to Mrs. Hearne of the fact of his payments was not made until 1888, about the time when the ejectment proceedings were taken which extinguished the real security for her money. We are not told when the lands were evicted; "about 1888" is the only date given. These facts, coupled with the non-disclosure of the fact that he was a puisne mortgagee, satisfy me that he began to pay these premiums as agent for Mr. Power, looking to him for repayment, and that he continued to do so until he became alarmed about the security in 1888, and that he then for the first time thought of getting Mrs. Hearne to pay the current premiums, and asked her to do so. It is only the natural inference from the position and conduct of Mr. Kelly, during the period from 1882 to 1888, that he made these payments for Mr. Power as his principal, and charged them against him in his accounts, which were not produced, trusting (as many another agent has done, and been disappointed) that he would be able to pay himself out of the moneys passing through his hands. It is inconceivable that he can have looked upon Mrs. Hearne as liable to repay him, when he never told her of his payments, nor of the default of the mortgagors, and, so far as she was concerned,

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looking to the policies would then have been equally making her pay them. His second letter expressly disclaims the idea of making her personally liable. I, therefore, cannot find any evidence that these payments were, in fact, made by Mr. Kelly under any express or implied contract, or with the intention of resorting either to Mrs. Hearne, or to her property, to make them good. I do find evidence to the contrary, but the *onus* is on the claimant.

Mr. Green, in his able argument, said, under compulsion of the facts, that it is an inference of law, if a mortgagee of a policy pays a premium, that he pays it as mortgagee, and in respect of his interest. Such an inference would be contrary to the fact in many cases. Many an agent or solicitor who has a mortgage on the property of his principal, or of his client, makes payments for the advantage of the property, by way of advances to his employer, trusting that he will be able to recoup himself out of future receipts, or looking only to the employer, not thinking of any interest which he may himself have in the property. It would be a very dangerous thing to lay down that it is an inference of law, regardless of the fact, that such payments are made in any way which can give a lien or charge upon the interest of third parties without their knowledge. But the inference is one of fact, and not of law, and from the facts here, I draw the conclusion that the payments made prior to 1888 were made neither under contract, nor in respect of any interest in the property, nor on behalf of Mrs. Hearne, but by Mr. Kelly as agent and solicitor for the mortgagors, and therefore that the claim against Mrs. Hearne, the prior mortgagee, fails in respect of those payments.

On the second branch of the case, from 1888 to the present time, all equity, as popularly understood, is in favour of Mr. Kelly. All that is against him is that his letters did not tell the whole truth. But I cannot give any less effect to his letters of July, 1888, than that of informing Mrs. Hearne that the mortgagor had no money available to pay the premiums, and that, if paid at all, they must be paid either by her or by Mr. Kelly on her behalf, and upon the terms of his looking, as a salvagor, to the policy-money for repayment.

Mr. Kelly, when Mrs. Hearne got the first letter, lived so near that her reply reached him within twenty-four hours. Yet she allowed four weeks to elapse, covering the time for paying the

premiums for 1888, and then she sent a well-advised and clever answer, for while she repudiated all liability, she said nothing about how the premiums were to be paid, nor about what Mr. Kelly had paid while he was kept waiting for her answer.

Mr. Kelly's second letter, which conveys that he had never intended to hold her personally liable for any of the premiums which he had paid, increases the difficulty of giving him any lien or equity for the premiums prior to those which he had asked her to pay. In what priority, as against his own past or future payments, would he have admitted her entitled to repayment of the premiums for 1888, if she had paid them as he had asked? But both as to those premiums, and as to the subsequent ones, she stood by while he paid them for her benefit, knowing that he was doing so under the belief that he was to have a salvage claim for his money.

I do not believe that there is any difference in principle between the equities which are recognised in England as "incidental or accessorial," and those which we metaphorically describe in Ireland as "salvage" and "graft." It is remarkable that these terms, so long and familiarly known here, like some other Irish products, do not seem to find favour in England. Our English brethren have objected to the introduction into equitable terminology of a word borrowed from Admiralty law, and they complain that it is misleading because the maritime lien for salvage does not rest on request, privity, acquiescence, or even knowledge, and arises upon the saving of the property by a stranger, or even against the owner's will. Equity, on the contrary, whether in England or Ireland, never gives a lien, or charge, for money paid for, or with the effect of, preserving property, unless there is some recognised privity or relation between the parties, or between the preserver and the property. Our calling such payments "salvage payments" where they confer a lien, or give rise to an equity, is merely a matter of nomenclature, and describing a "salvage claim" as "incidental or accessorial" is merely translating a good metaphor into prose.

I do not know, or admit, that "salvage" or "graft" has ever been rightly established in Ireland upon any ground which would not have supported the same claim in England, though, owing to

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the numerous cases arising under our ejectment code, and to the prevalence of leases renewable on fines, and of sublettings, in Ireland, the instances in which "salvage claims" have been discussed and recognised by our Courts of Equity have been much more numerous in this country. The same remark applies to the kindred class of derivative equities which we call "grafts." I shall try, however, to use the word "salvage" only where the thing would be recognised by the strictest English equity lawyer, as coming within some one or more of the categories of Fry, L.J., in *Leslie* v. *French* (1).

Mr. Kelly's letters in effect said to Mrs. Hearne—"This property of your's will be lost, if I do not save it by paying my own money to save it. I am willing to do so; but, if I do, I must be repaid out of the property which I save." It is not left merely to inference that she acquiesced in his paying the premiums after this intimation. In her letter of August 16, Mrs. Hearne says that she will ask her son to call on Mr. Kelly. He saw Mr. Kelly accordingly, and in his affidavit he says—"On behalf of my mother, Mrs. Ellen Hearne, I often called on the late Mr. Pierse Kelly with reference to the mortgage given to my mother by Mrs. Maria Power, as the said Pierse Kelly was solicitor for my mother as well as solicitor for Mrs. Maria Power, and, as I believe, he was also agent for the said Maria Power. I never requested or authorised the said Pierse Kelly or his representatives to make any payment for or on account of premiums on the policies mortgaged to my mother by the said Maria Power." That is all he says on the subject. He does not even suggest that any objection was made to Mr. Kelly's payment of the premiums of 1888, or subsequently, upon the terms of his letters. I cannot read Mr. Hearne's affidavit otherwise than as an admission that he and his mother acquiesced in the payments being so made by Mr. Kelly, for it is plain that they knew that the premiums were paid somehow, and that the policies were thereby preserved. In my opinion the conduct of Mrs. Hearne, after the intimation given to her by Mr. Kelly in 1888, distinctly brings the case within the authorities for relief in equity.

(1) 23 Ch. D. 552.

Lord Justice Cotton says in *Falcke* v. *Scottish Imperial Insurance Co.* (1), that very slight circumstances may be sufficient to imply a request. It appears to me that, if it were necessary for our decision, the facts of this case would even justify our implying a request by Mrs. Hearne to Mr. Kelly to pay the premiums from 1888 on the security of the policies. After the letter of August 16, when Mrs. Hearne declined to accept any responsibility, or make any payment, but knowingly allowed Mr. Kelly to keep the policies up at his own expense, I should, if necessary, hold him entitled to treat his payments as having been made for the protection of the interest as puisne mortgagee, which he had in fact, even though she did not know of it, and in that view his claim might come within the fourth category in *Leslie* v. *French* (2). When Fry, L.J., described the right of a mortgagee under such circumstances as a right to add his payments to his charge, he was not dealing with the question of priority at all, and I do not think that he meant to say that such payments would be recoverable only in the same priority as the charge. The priority in which such payments should stand is to be ascertained by rules of equity, and not merely by the priority of the estate which the party paying already has in the common property. I think that they ought to rank in equity upon the same principle which regulates the priority of a lien for the redemption-money of a leasehold estate, where a sub-lessee redeems a superior interest from eviction. The whole property being preserved by one for the benefit of all, it would seem contrary to equity that the right to be recouped should attach only to the inferior interest of the salvor. Such a rule would often deprive the man who paid his money of all chance even of repayment, while others, whose default had threatened to forfeit what was their property as well as his, would keep the property which had been preserved at his expense. I do not believe that Fry, L.J., was contemplating this matter of priority at all, and it certainly was not necessary to his decision in *Leslie* v. *French* (2).

(1) 34 Ch. D. 234. (2) 23 Ch. D. 552.

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HOLMES, L.J. :—

I am of opinion that the law relating to salvage payments made by incumbrancers and persons having other interests in property, as it is understood in Ireland, is correctly stated in the short judgment of the Vice-Chancellor in this case.

The most familiar instance of such a payment is in the case of an ejectment for non-payment of rent where the premises are redeemed by a puisne incumbrancer, or sub-lessee who is not bound to pay the rent, but who pays it to preserve his own incumbrance or interest. So long ago as the year 1823, it was held in a case not reported till long afterwards—*Locke* v. *Evans* (1)—that advances for head rent made by a sub-tenant for the purpose of redeeming his landlord's interest were the first charge on such interest in priority to incumbrances of an earlier date, and that the salvagor was entitled to a decree for sale to repay the advances. Lord St. Leonards, while Lord Chancellor of Ireland, had experience in cases of this kind, and afterwards referred to them in *In re Tharp* (2) in the following words :—"In Ireland it is a very common equity to have, as a prior charge to all other incumbrances, what is called salvage money:—Where a leasehold estate, or an estate held for lives to which half a dozen people are entitled in succession, many of them being mortgagees, according to certain priorities, the last man of all who is entitled after everybody, being in possession, redeems, I may say, the estate by paying the landlord, who otherwise would have recovered the estate and taken it from everybody ; this payment is what is called salvage money. That is an established equity, and a very proper equity. He that pays the salvage has a prior incumbrance to every other charge and interest, because so far as any interest is left to anybody beyond the charge, it is acquired by that payment in the shape of redemption money."

Ten years after Lord St. Leonards had left Ireland, the whole subject was very fully discussed by three distinguished lawyers when the Great Seal was in Commission. There was a difference of opinion in the Court, and the facts can be distinguished from those of the present case ; but the question discussed was whether

(1) 11 Ir. Eq. R. 52 (2) 2 Sm. & G. 578 *n.*

a payment made to preserve a property becomes a paramount charge, or is a mere addition to, or expansion of the interest of the person making it. The former was the view taken by the majority of the Court; and Master Brooke, in giving judgment, said (1):— "I have always understood that the reason of the priority which Courts of Equity give to the salvage creditor is this, that the payment is in a manner compulsory, and that in the common danger it is for the benefit of all to encourage an advance of money without which the mortgagor himself, and everyone of his creditors must suffer a serious loss. It is considered beneficial for all parties to give the most ample remedies to him who has saved the common security, provided they are confined to that property which but for his advance would have been lost to everyone concerned. It was suggested in argument that the remedies of the salvage creditor could not be greater than those belonging to his original security; no authority is cited for this, and no reason is suggested. The remedies and privileges yielded to the creditor who saves the estate are founded on the principle that every just encouragement should be given to any interested party who in the common emergency will advance money for the good of all."

The views here expressed have been since acted on uniformly by the Irish Courts; and whether the principle in the term "salvage" in this connexion has been adopted in England or not, we are not at liberty to disregard what has in this country become an established rule of law. Three conditions are necessary to constitute a good salvage payment. 1. It must have had the effect of saving for the benefit of everyone interested property which would otherwise have been lost. 2. It must be made by a person having a charge on or an interest carved out of the estate of the ultimate owner of such property. 3. The salvagor must make it voluntarily for his own advantage, and not in pursuance of an obligation or in the performance of a duty, or as the agent of another. Where these conditions exist I am of opinion that neither a request from nor notice to persons having prior interests is required to give it priority. But, of course, the fact that the payment was of the character which I have described must be

(1) 11 Ir. Eq. Rep., pp. 42, 43.

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Holmes, L.J.

shown satisfactorily, and the burden of proof rests upon the claimant. In the present case Mrs. Kelly has failed to sustain this burden. The position of her husband was a peculiar one. Not only did he act as solicitor for both mortgagor and mortgagee in carrying out the mortgage of 1872, but he continued to be the solicitor of both down to 1888, and probably later. In 1881 he became the agent to collect the rents of the lands upon which, as well as on the policies of assurance, the mortgage debt of 1872 was charged. It would have been part of the business of land agent, as it is understood in Ireland, to pay the premiums on these policies out of the rents received. He would not have been bound to make advances out of his own moneys, but to do so is the rule rather than the exception in this country. It is true that Mr. Kelly was himself a last incumbrancer on the property—also a very usual circumstance in the case of a solicitor or agent; but when he paid the premiums that became due next after his appointment to the agency—the first occasion on which he had ever paid them—the reasonable inference is that he paid them as agent and charging them against his principal. He continued to do so down to 1888. It appears that a receiver was appointed over some interest in the lands in 1884; but it does not appear whether this terminated Mr. Kelly's agency as regards the mortgagor, and it certainly did not terminate the relationship between them of solicitor and client. Under these circumstances, it was for the claimant to show that Mr. Kelly was paying the premiums for himself and to preserve his own security. The only fact relied on to support this view is that the money advanced by him was never repaid. But a man cannot by an afterthought convert a bad debt due to him by the owner of an equity of redemption into a permanent charge on a mortgaged estate. No doubt the deaths of Mr. Kelly and Mrs. Power have made it difficult for Mrs. Kelly to prove her case; but we have not even Kelly's books to show how these payments were dealt with at the time. The correspondence with Mrs. Hearne in 1888 goes strongly to show that up to that time Kelly had been paying the premiums on behalf of Mrs. Power, the mortgagor. I have already pointed out that he began to pay them on being appointed agent. It is remarkable that he first communicated on the subject

with the mortgagee, Mrs. Hearne, when the lands were about to be evicted, and when all chance of being repaid by Mrs. Power was at an end. Kelly's first letter shows that he had never before brought to the notice of his own client, Mrs. Hearne, the subject of the premiums. If he had been paying them in the interest of the mortgagees, and not as representing the mortgagor, it is incredible that he would have done so without communicating with a client who was probably the only person interested in keeping up the policies. His letter of July, 1888, was not a candid one. He seeks to convey in it that he was paying on Mrs. Hearne's behalf, and his object seems to have been to obtain from her some recognition of her liability. In this he failed; but I think that after that date his payments assumed a different character. They were certainly not salvage payments made to preserve his own security, which was then, if not long before, completely valueless. But he was no longer acting for the mortgagor, whose property had entirely disappeared. He had given notice to Mrs. Hearne that he was willing to pay for her benefit, looking to the policies for recoupment. He was probably led to do so by a feeling that he had advised her to accept a most unsatisfactory investment, and I have no doubt that from that time forward Mrs. Hearne knew and recognised that he was making the payments on her behalf. In *Falcke* v. *Scottish Imperial Insurance Co.* (1) Cotton, L.J., says:—"I think that in a case of this sort, when money is paid in order to keep alive property which belongs to another, a request to make that payment might be implied from slight circumstances." I hold that such circumstances exist in this case as to the payments made since July, 1888, and that the claimant is entitled to be paid the amount thereof with interest out of the proceeds of the policies.

Solicitors for the Insurance Company: *Rooke & Rooke.*
Solicitors for Mrs. Hearne: *Dobbyn, Tandy & M'Coy.*
Solicitor for the representatives of Pierse Kelly: *Arthur Kelly.*

G. Y. D.

(1) 34 Ch. D. 234.

Appeal.
1898.
June 2.

In re KING, Deceased.
KING *v.* KING (1).

Estate pur autre vie—*Devolution of estate—Special occupant—Intestacy.*

A lessee of lands which had been demised to the lessee, his heirs, executors, administrators, and assigns, for three lives or for thirty-one years, by his will devised the lands to trustees in trust for A B, without any words of limitation in relation to either the legal or equitable interest. A B died intestate. One of the lives mentioned in the lease was still in existence. The term of years had long since expired.

Held (affirming the decision of Porter, M.R.), that the heir-at-law, and not the personal representative of A B, was entitled to the estate *pur autre vie.*

The facts of the case are reported—[1898] 1 I. R. 91. The plaintiff appealed.

O'Connor, Q.C., and *D. Kehoe*, for the appellant:—

The interest in the lands passed to the administrator under the 6th section of the Wills Act. In the case of estates *pur autre vie* the heir can only take *per formam doni*, but here is no mention made of the heir of the devisee. The only time that the word "heir" is used is in the terms of the original grant. There is a distinction between leases for lives renewable for ever, and estates *pur autre vie*, properly so called, because the element of *quasi* inheritance which that tenure involves discriminates it from an estate *pur autre vie*, properly so called. The head landlord might be disposed to grant a renewal to one person, "the heir," but not to a number of persons such as the next of kin. *Blake* v. *Jones* (2) and *Wall* v. *Byrne* (3) were cases of leases for lives renewable for ever. Furlong's work on Landlord and Tenant was published in the same year as the latter case, and at page 234 he states that the

(1) Before Lord Ashbourne, C., and Fitz Gibbon and Holmes, L.JJ.
(2) 1 Hud. & Br. 227.
(3) 2 Jo. & Lat. 118.

estate goes to the heir. *Doe* d. *Lewis* v. *Lewis* (1) is to the contrary effect. There was an earlier decision of Lord Mansfield in *Philpotts* v. *James* (2) which is reported in a very meagre way. *Sheppard* v. *Manning* (3) is in our favour. In *Mountcashell* v. *More-Smyth* (4) there was a devise to two trustees and their "heirs" in trust for two persons without any words of inheritance, and it was sought to carry on the words of inheritance from the estate of the trustees to that of the beneficiaries. The ground of the decision in the House of Lords was that there were no words of inheritance attached to the gifts to the son: see Lord Davey's judgment, p. 164.

Wakely, for the Committee of the heir-at-law (a lunatic):—

There is no difference on this point between leases for lives renewable for ever and estates *pur autre vie* properly so called. The judgments in *Blake* v. *Jones* (5) and *Wall* v. *Byrne* (6) have always been considered as having settled the rule of law. They have remained unchallenged for over fifty years, and on the faith of these decisions a large amount of property has changed hands.

Section 6 of the Wills Act and section 9 of the Landlord and Tenant Act, 1860, only provide for the cases where there is no "special occupant."

LORD ASHBOURNE, C.:—

This is an appeal from a judgment of the Master of the Rolls, and it is important in consequence of the vast amount of property in Ireland held under leases *pur autre vie*, and because we are asked to interfere with decisions that have prevailed in this country for over half a century. The question is raised with reference to certain lands demised in 1857 by Eyre Coote to James Bride, his heirs, executors, administrators, and assigns, for three lives or thirty-one years concurrent. James Bride by his will devised these lands to trustees and executors upon trust for Nicholas King. Nicholas King died intestate, and in a proceeding for the adminis-

(1) 9 M. & W. 662.
(2) 3 Doug. 425.
(3) [1897] 2 Ch. 67.
(4) [1896] A. C. 158.
(5) 1 Hud. & Br. 227.
(6) 2 Jo. & Lat. 118.

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tration of his assets the Chief Clerk's certificate states the question which arose with reference to the matter thus:—"The plaintiff claims that the lands of Skiddoo, containing 319A. 0R. 38P. statute measure, situate in the barony of Nethercross, and county of Dublin, held under lease dated the 31st October, 1857, from Eyre Coote to James Bride, for three lives, of whom one is still surviving, to which the intestate was entitled at the date of his death, passed upon his death intestate to his administrator to be distributed as personal estate, and not to John King, the heir-at-law of the intestate." Thus, the contest is between the heir-at-law and the personal representative of the intestate; the term of years has expired, one of the lives is in existence, and therefore we may take it that the demise is to James Bride and his heirs, *pur autre vie*. The Master of the Rolls states the case in this way (1):—"The question then, is, whether an estate *pur autre vie*, limited to a man and his heirs, and devised by his will to another without words of limitation, will descend to or devolve upon the heir of the devisee as special occupant, or go to the executor by virtue of the statute or otherwise." Nothing could be stated with more precision. If the question was not covered by authority, other considerations might be open, and the argument of Mr. O'Connor might be entitled to some weight. But the question is not a *res nova*; it is not uncovered by authority; there is a concurrence of Irish decisions on the question for over half a century, and there has been a practice of conveyancers for a period antecedent to that. The first authority is *Wall* v. *Byrne* (2), decided in 1845; and when I see that the case was decided by Lord St. Leonards, great weight must be attached to the decision. Lord St. Leonards came over to Ireland with all the learning of conveyancers in England, and applied his mind to the decision of the question. He must have had a very clear view of the question, because he would scarcely allow the question to be argued. He stated in the middle of the argument—"If ever a point was closed by decision it is this: that where a man has an estate *pur autre vie*, limited to him and his heirs, and devises that estate by words which, without words of limitation, would pass the *quasi* inheritance—as the words here

(1) [1898] 1 Ir. R. 93. (2) 2 Jo. & Lat. 118.

would—and the devisee dies intestate, the persons to take are the heirs, and not the personal representatives of the devisee. The point was so decided in this country many years since; and that decision has been followed in England, and many opinions have been given on it." The English decision he refers to was probably a case before Lord Mansfield of *Philpotts* v. *James* (1), the report of which is of the most meagre description, and the judgment is given in a few lines. But it is a decision, and Lord St. Leonards refers to it as supporting his view. But *Wall* v. *Byrne* (2) does not stand alone. So far as I know it has been uniformly followed in advising upon titles in this country. There is also the opinion expressed by Mr. Furlong in his work on Landlord and Tenant (3). It is true that Lord St. Leonards' decision was pronounced after Mr. Furlong's book was published, but Mr. Furlong was a very good lawyer, and this passage in his book adds the weight of his authority. There is also the decision of *Blake* v. *Jones* (4) by the Court of Exchequer Chamber in this country, which must be fully weighed and considered. It must also be noted that Lord St. Leonards had before him, at the time he decided *Wall* v. *Byrne* (2), the English case of *Doe* d. *Lewis* v. *Lewis* (5), and he did not think that case or its reasoning should at all prevent him from deciding as he did.

Then, *More-Smyth* v. *Mountcashell* (6) has been referred to, but the question which arises here did not occur in that case, and nothing was laid down in that case, either in this Court or in the House of Lords, that would at all prevent us from deciding this case in accordance with the previous authorities to which I have referred. Reliance was placed on a passage from the judgment of Lord Davey, but I do not think he intended to lay down any proposition which conflicted with the practice of Irish conveyancers on this subject.

In my opinion we are not entitled, having regard to the practice of Irish conveyancers, to the judgment of Lord St. Leonards, the judgment of the Exchequer Chamber in Ireland, and to the authority of Mr. Furlong, to reverse a rule of law which has

(1) 3 Doug. 425.
(2) 2 Jo. & Lat. 118.
(3) LaTouche's Furlong, pp. 242-3.
(4) 1 H. & B. 227 *n.*
(5) 9 M. & W. 662.
(6) [1896] App. Cas. 158.

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prevailed for so long; and, if it is now to be reviewed, we must leave that to the House of Lords or to the Legislature. I concur with the closing paragraph of the judgment of the Master of the Rolls—"When one remembers that for the greater part of a century the contrary view has prevailed; that titles have been sold and settled in an infinite number of cases on the faith of the correctness of the view in question; and that it has been accepted by the profession without question during so long a period in determining rights arising out of one of the most common of Irish tenures, I feel that I am bound to act upon the authority of the cases I have cited, and to decide in favour of the heir-at-law. It is clear to my mind that nothing short of an Act of Parliament ought to be allowed to alter a settled rule on which so many titles to estates in this country depend."

I am therefore of opinion that the judgment of the Master of the Rolls should be affirmed, and the appeal should be dismissed with costs.

FITZ GIBBON, L.J.:—

I concur with the Lord Chancellor. In consequence of the wide application, in Ireland, of any decision dealing with the tenure *pur autre vie*, I shall state my reasons.

In 1845, in *Wall* v. *Byrne* (1) Lord St. Leonards concluded his judgment with these words:—

> "It is a settled point, and not now open to be disturbed. It was settled by a case in this country, decided upon great consideration, which has been since recognised and acted on. I shall therefore follow those authorities, and leave the error, if it be one, to be corrected elsewhere."

That judgment is now accentuated by the fifty-three years during which it has been acted on. When laying down the law for Ireland that, if lands are granted *pur autre vie* to A and his heirs, and if A, by deed or will, gives all his estate in those lands to B, without any words of limitation, B's heir, and not his personal representative, will succeed B as special occupant, we must assume that the Judges found some legal reason for giving the

(1) 2 Jo. & Lat. 118.

property to the heir. Mr. O'Connor argues that where there is a grant to A and his heirs, *pur autre vie*, A's heir takes *per formam doni*, but that B's heir cannot take *per formam doni*, because he is not named. Lord St. Leonards gives his reason in these words:—

"The testator gives *all his interest* in the lands to his devisees; and both law and good sense require that they should take *the same interest* which he himself had."

It was never disputed that the whole interest, as a beneficial thing, passed. The question was *to whom* it passed? Therefore Lord St. Leonards must have meant by "the same interest," not merely an interest of the same *quantity*, but an interest having the same *quality* of passing to the heir. It is a reasonable principle, consistent with the English decisions, that when "*quasi*-descendibility" to the heir has been once impressed on the estate, *per formam doni* or otherwise, that quality shall continue to affect the estate, whenever and however it is transferred, until it is altered. The express nomination of the "heirs" in the original grant or creation of the estate may well be taken as a sufficient nomination of the heir of the tenant for the time being as special occupant, in preference to the personal representative, until some other nomination is expressly made, or unless the statute intervenes.

The distinction between a deed and a will in conveying property without words of limitation is mentioned by the Master of the Rolls, and Mr. O'Connor contended that Lord Davey's reference to this distinction in *More-Smyth* v. *Mountcashell* (1) carried his case. With all respect, I understand the materiality of the distinction between a deed and a will, when dealing with real estate, so long as, if words of limitation were not used, an estate for life only would pass by the deed, whereas by the will all the estate of the testator would pass, in the absence of a contrary intention. *Brenan* v. *Boyne* (2) declared the law to be that, in dealing with lands held *pur autre vie*, owing to the nature of the estate, the whole interest passed absolutely without words of limitation. As regards estates *pur autre vie*, it was a question of intention, and I

(1) [1896] A. C. 158. (2) 16 Ir. Ch. Rep. 87.

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can not reconcile Lord Davey's remarks with the Irish law, from *Wall* v. *Byrne* (1) to the present time. Dealing with an estate *pur autre vie*, upon which, in its original creation, the quality of going to the heir has been stamped, and which will pass without words of limitation by a deed as well as by a will, I cannot see the point of referring to any distinction between a deed and a will for our present purpose. Lord Davey says :—

"It must be admitted that where an estate *pur autre vie*, whether equitable or legal, *is created* without any designation of a special occupant, the law casts it in the event of the death of the grantee, upon the executor, and it is for those who say that it ought to go to the heir to show that there are some words *in the creation* of that equitable or legal estate, *pur autre vie*, which throw it upon a special occupant."

This is plainly right, when applied to the creation of the estate; for, if no one is named as special occupant, the heir does not take. He proceeds :—

"It has long since been established that in determining the quality of an estate *pur autre vie*, that is, whether it goes to a special occupant, or to the executor, by statute, you look to the terms of the last conveyance of the estate, and not to the original grant, to ascertain whether it is to go to the heir, or to the legal personal representative."

This amounts to stating that, in transferring an estate *pur autre vie*, a subsequent nomination of the special occupant will prevail over the original one, or will supply a nomination where there was none previously. But the learned Lord adds :—

"If it is to go to the heir, my present impression is that express words are necessary, and that in a deed, at all events, the word 'heir' must be used for the purpose of designating the special occupant."

This is not stated as a definite opinion, and, with all respect, I believe that the point has never been decided, and that the observation can not, consistently with Irish authority or practice, be extended to any case in which, in its original creation or otherwise, an estate *pur autre vie* has once had stamped upon it

(1) 2 Jo. & Lat. 118.

the quality of passing to the heir as special occupant. It is my impression that express words are necessary to deprive it of that quality, and that there is no distinction between a will and a deed as to the mode of designating the special occupant.

I must make one remark about *Mountcashell* v. *More-Smyth* (1). It was not decided in this Court upon the ground that the estate had belonged to an infant whose guardians had no power to alter its transmissible quality. It was decided as the case of an equitable estate *pur autre vie*, given to an infant without any words, or any indication of intention, which could give it, on his death, to his heir, or could take it away from the personal representative to whom the statute gave it. The "guardians," whether the power existed or not, had done nothing to alter the quality of the infant's interest. The main point decided in favour of the appellant was that the nomination of the heirs of the grantees of the legal estate did not carry the equitable estate of the infant to his heir as special occupant, in spite of the statute, the infant being named, *simpliciter*, as the sole and absolute equitable owner.

I can find no warrant for the distinction sought to be drawn by Mr. O'Connor between estates *pur autre vie* and leaseholds for lives renewable for ever. *Mountcashell* v. *More-Smyth* (1) was argued and decided upon the principles and authorities applicable to leases for lives renewable for ever, and, upon the other hand, the cases of renewable leaseholds for lives have always been argued and decided upon the doctrines applicable to estates *pur autre vie*.

HOLMES, L.J.:—

I concur. If this case had come on for discussion a hundred years ago, it would have been considered difficult, and the result would have been uncertain; but at the present day there is no room for doubt.

So long ago as the year 1813, a question identical with that involved in this appeal was considered in the Irish Exchequer Chamber in *Blake* v. *Jones* (2). Theretofore there had been con-

(1) [1896] A. C. 158. (2) 1 H. & Br. 227 *n.*

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flicting decisions. The Court of Queen's Bench in England presided over by Lord Mansfield, had taken one view, which although it commended itself to Mr. Fearne, had not been accepted by Lord Kenyon nor by the Irish Court of Queen's Bench. In *Blake* v. *Jones* (1) all the Irish Judges, save one, held that where a man having an estate *pur autre vie* limited to him and his heirs devises that estate by words which, without words of limitation, are sufficient to pass his entire interest, and the devisee afterwards dies intestate, the person to take is the heir and not the personal representative of the devisee. The proposition thus affirmed has been since acted on in this country where the prevalence of leases for lives with covenants for perpetual renewal has given this kind of tenure a prominence which it does not possess in England. Mr. Furlong, a very erudite and experienced real property lawyer, in the first edition of his work on the Law of Landlord and Tenant accepts the decision in *Blake* v. *Jones* (1) without hesitation. In the year following the publication of this book, Lord St. Leonards, then Lord Chancellor, took the extreme course in *Wall* v. *Byrne* (2) of declining to hear the contrary proposition argued on the ground that he could not allow any doubt to be cast on a matter that had been so long regarded as well settled. My own recollection of thirty years back is that counsel were in the habit of advising on titles on the assumption that these cases could not be questioned. The Master of the Rolls has followed them in the judgment appealed from. Why are we to overrule them? No doubt, *Doe* v. *Lewis* (3) seems inconsistent with them; but this authority was brought to the notice of Lord St. Leonards and distinguished, whether on good grounds or bad it is not for me to say.

The recent case of *More-Smyth* v. *Mountcashell* (4) is wholly different. In the present case the lease of 1857 makes the heirs of the lessee the special occupant. It is established by the authorities I have mentioned that when the estate thus created is given to another without words altering the devolution, it retains in the hands of the donee the same characteristic as regards transmissibility to the heir which it possessed in the hands of the donor.

(1) 1 H. & Br. 227 *n.*
(2) 2 Jo. & Lat. 118.
(3) 9 M. & W. 662.
(4) [1896] A. C. 158.

Like Lord Justice Fitz Gibbon, I see no reason why this rule should not apply to a transfer by deed as well as to a gift by will; but as we have in this case to deal with a will, I need not embarrass myself with this consideration. In *More-Smyth* v. *Mountcashell* (1) there was not, as regards the beneficial estate *pur autre vie*, either by original creation or by subsequent transfer, a special occupancy in the heir. Therefore, the proposition in *Blake* v. *Jones* (2) and *Wall* v. *Byrne* (3) did not apply.

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The Master of the Rolls in deciding this case followed authorities which are equally binding on this Court. Therefore the appeal must be dismissed.

Solicitors for the appellant: *Tench & Reynolds.*
Solicitor for the respondent: *M. C. O'Meara.*

R. D. M.

KING-HARMAN *v.* CAYLEY.

(1893. No. 476.)

M. R. 1898. March 21.

Accumulation—Maintenance—Jurisdiction to allow maintenance to infant "presumptively entitled"—Ability of father to maintain eldest son.

A testator appointed real estates to his daughter for life, and after her death to her first and other sons successively in tail male, and provided that in the event of her marrying without her mother's consent the rents and profits should be accumulated by his trustees during the minority of her eldest son, and empowered them to apply the rents and profits in reduction of charges on the estate. By a subsequent clause in the will he empowered his trustees to apply any part of the annual income to which any object (being a minor) of the trusts already declared should be entitled or presumptively entitled towards the maintenance of such object.

The daughter married without her mother's consent, and had two sons infants. An action was brought in the name of the eldest infant to administer the real and personal estate of the testator, and the rents and profits of the real estates, which were very large, were applied by the receiver in reduction of charges. The income of the infant's parents was considerable, but not suffi-

(1) [1896] A. C. 158. (2) 1 H. & Br. 227 *n.* (3) 2 Jo. & Lat. 118.

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cient to suitably maintain and educate him, having regard to the position in life which he would occupy on attaining his majority :—

Held, that the trustees had power, notwithstanding the accumulation clause, to make an allowance by way of maintenance, and that, under the circumstances, it was a proper case for making the allowance asked for.

SUMMONS.

This was an application on the part of Edward Charles King-Harman the plaintiff, an infant, by Thomas Joseph Stafford, his next friend, that the sum of £500 per annum, or such other sum as to the Court might seem fit, might be allowed for the maintenance and education of the plaintiff, from January 1st, 1898, and for the time to come during his minority or until further order, and that such allowance might be paid by the receiver appointed in the action to Thomas Joseph Stafford, the guardian of the plaintiff, by half-yearly payments out of the income of the estate.

The action was brought to administer the real and personal estate of Edward Robert King-Harman of Rockingham, Boyle, in the county of Roscommon, who died on June 10th, 1888, possessed of large estates in the said county, leaving a widow, Emma Frances King-Harman, and a daughter, Frances Agnes King-Harman, his only child, him surviving.

Edward Robert King-Harman, by his will, dated Nov. 30th, 1886, appointed his Rockingham and Ballinamuck estates to the sole and separate use of his daughter Frances Agnes King-Harman during her life, free from the control of any husband she might marry, and without power of anticipation, and from and after her decease to the use of her first and other sons successively in tail male, with divers remainders over.

The will contained a provision that the tenant for life or tenant in tail, and the husband of any female who became so entitled, should take the name of King-Harman. The testator then declared that in case his daughter should marry in her mother's lifetime and without her mother's consent, his daughter should thenceforth, during the remainder of her life, hold the said estates in trust for her mother the said Emma Frances King-Harman and her assigns during their joint lives, and in case the said Emma Frances King-Harman should die in her daughter's lifetime, then in case no child of his daughter should then have

attained the age of twenty-one years, in trust to pay to or permit and suffer the rents and profits of the said estates to be received by the trustees of his will until a child of his daughter should attain the age of twenty-one years.

The testator then provided that any rents and profits which should be received by his trustees under the provisions above mentioned should be invested in certain authorized securities, so that the same and the resulting income thereof might accumulate by way of compound interest, and directed his trustees, on his daughter's death, or as soon as any child of hers should attain twenty-one years of age, or at any previous time, or from time to time, to apply the accumulated fund, or such part as was available, in reduction of the charges on the said estates.

After several devises and bequests not material to the present case, the will contained a maintenance clause in the following words:—"I declare that my trustees shall have power to apply the whole or any part of the annual income to which each or any object (being a minor) of the trusts and provisions hereinbefore contained shall be entitled or presumptively entitled, in or towards the maintenance and education or otherwise for the benefit of such object, and that either by applying the same personally or by paying it to the guardian or guardians of such minor for the purpose."

The testator appointed George Douglas King-Harman and Sir George Allman Cayley trustees and executors of his will, which was proved by them on August 31st, 1888.

The testator's daughter afterwards married Doctor Thomas Joseph Stafford in her mother's lifetime, but without her consent, and thereby forfeited her life estate under the will. There were two children of the marriage, namely, Edward Robert King-Harman, born on April 13th, 1891, and another son born on January 8th, 1895.

In 1893 this action was brought by Dr. Stafford in the name of his eldest son, to have the real and personal estate of the testator administered. The trustees of the will were named defendants, as also Mrs. Stafford and persons interested in remainder, and a receiver was appointed over the real estates of the testator, and by the direction of the Court the surplus rents were applied

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by him in payment of arrears due to the testator's widow, who afterwards died, and in reduction of charges on the said estates, pursuant to the direction in the will.

Affidavits were made in support of the application for maintenance, stating that the joint income of Dr. and Mrs. Stafford was £1300 a-year, £700 of which was Dr. Stafford's salary as an Inspector of the Local Government Board, but that it was impossible for them to duly provide for their children and their education, and particularly for the health and education of their eldest son, who was in delicate health, and had been ordered to winter abroad, unless assistance was provided out of the income of the Rockingham and Ballinamuck Estates.

It appeared from a memorandum furnished by the receiver that there was an estimated annual surplus from those estates of £5983, after payment of outgoings.

Serjeant Jellett, Q.C. (with him *G. Y. Dixon*), in support of the summons:—

The maintenance clause in the will applies to Mrs. Stafford's eldest son, as he is a person presumptively entitled to the income, and will be entitled to the estate on attaining twenty-one. As tenant in tail male, he is within the terms of the clause, which provides for the assumption, by an infant of the name and arms of King-Harman, and cannot be excluded from the clause which provides for the maintenance and education of such infant.

The power given by this clause to the trustees is a power coupled with a trust, and the Court can exercise it if the trustees decline to do so: *White* v. *Grane* (1). This case is approved of by Lord St. Leonards: Sugden on Powers, p. 468. The Court can even interfere with the discretion of the trustees on a question of amount: *Davey* v. *Ward* (2). The Conveyancing Act, 1881, section 43, empowers the Court to grant maintenance, if there is no expression in the instrument to the contrary. In *Thatcher's Trusts* (3) there was an accumulation clause in the will, but it was held that it did not express "a contrary intention" within the meaning of the section, and that the trustees might exercise the powers given

(1) 18 Beav. 571. (2) 7 Ch. D. 754. (3) 26 Ch. D. 426.

by the section. On the like principle no inconsistency exists in the present case between the maintenance and accumulation clauses. In *Hunt* v. *Parry* (1) an order was made, though there was no maintenance clause in the deed, but this was under the Conveyancing Act. Here there is an express maintenance clause in the will, which applies, unless Mrs. Stafford's infant child is excluded from the benefit of it, by reason of her life estate having been forfeited by reason of her marriage. But this only substituted the life estate of Mrs. King-Harman for that of Mrs. Stafford, and involved no forfeiture of the estates limited in remainder to such life estates. The principle upon which maintenance in a case of this kind is granted is stated by Lord Eldon in *Wellesley* v. *Duke of Beaufort* (2), where he says that the Court does not measure the duty of maintaining the eldest son by looking at him only, but considers that it is for his interest that his brothers and sisters should be brought up in respectable stations, and measures the maintenance accordingly; and in *Tweddell* v. *Tweddell* (3), Lord Eldon lays down the rule in the same way. In *Malcolmson* v. *Malcolmson* (4), following *Jervoise* v. *Silk* (5), maintenance was granted notwithstanding the ability of the father to maintain his children, which was a question of degree. The sum asked for is a reasonable sum.

John Stanley, *Q.C.* (*Chaytor* with him), for the trustees of the will:—

The trustees have not refused to make an allowance to the minor, but they cannot do so without the order of the Court. It is submitted that there is an absolute dedication of the rents during Mrs. Stafford's life by the accumulation clause, which cannot be overriden by the subsequent maintenance clause. This clause only gave the trustees a power, and did not impose a trust, and their discretion cannot be interfered with. The use of the word "presumptively" causes a difficulty, but it is submitted that that word was inserted *per incuriam*, and that the power was only intended to benefit minors who were actually entitled. [They

(1) 32 Ch. D. 383.
(2) 2 Russ. 28.
(3) T. & R. 1.
(4) 17 L. R. Ir. 69.
(5) G. Coop. 52.

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cited *Shaw* v. *M'Mahon* (1); *Kemmis* v. *Kemmis* (2); *Wilson* v. *Turner* (3); *In Re Bryant* (4).]

As to the amount asked for, the trustees consider that it is too much.

THE MASTER OF THE ROLLS:—

I am not troubled with the difficulties which stood in the way of the applications for maintenance in the cases of *Shaw* v. *M'Mahon* (1) and *Kemmis* v. *Kemmis* (2) cited by Mr. Stanley, although in both the Court decided that they had no power to set aside the trusts of a will, for the purpose of providing maintenance, in the face of an absolute direction for accumulation. Those cases are essentially different from the will before me, because it contains an express power to the trustees to grant maintenance, which was not contained in either of the wills in those cases. There being an express power in the present will, it is not necessary to rely on section 43 of the Conveyancing Act, 1881, but I may refer to that enactment as showing that the tendency of modern legislation is not in favour of the policy of a strict application of the rule laid down in the earlier cases. The trustees of the will have appeared to oppose this application, or at least to point out what may be the legal difficulties in its way; but I am of opinion, that the view entertained by them, that they have no power to grant maintenance, is not correct. The will is a very carefully prepared one. Mrs. Stafford, the testator's daughter, was made tenant for life, but she forfeited her life estate by marrying without her mother's consent, and her eldest son became entitled to the estates as tenant in tail, subject to his attaining twenty-one years of age. The present application is not made by Mrs. Stafford with a view of herself indirectly obtaining part of the income of the life estate which she forfeited; but it is in substance an application by her husband, Dr. Stafford, on behalf of their eldest child, for an allowance to enable him to maintain and bring up his son in a way suitable to the position which he will hold, if he lives to be twenty-one.

(1) 8 Ir. Eq. R. 584.
(2) 13 L. R. I. 373; 15 L. R. I. 90.
(3) 22 Ch. D. 521.
(4) [1894] 1 Ch. 324.

In an application to the Court by a father for an allowance for the maintenance of his child, the father must satisfy the Court that he has not sufficient means of his own to maintain his child properly, as it is his duty to do; but the circumstances of each case must be taken into consideration, and in a case like the present where the infant will probably succeed to a property of such magnitude, and must be brought up to be fit for the position he will occupy as owner of that property, I cannot apply with strictness the rule I have referred to as to the father's ability to maintain his child; or rather, I must interpret that rule as meaning that the father's ability to maintain his child imports ability to maintain him suitably to his position and prospects. The accumulation clause is contained in an earlier part of the will of the testator, and directs the rents and profits in the events which have occurred to be received by the trustees and accumulated during the minority of Mrs. Stafford's eldest son. The maintenance clause does not occur till near the end of the will, and is in these words: "I declare that my trustees or trustee shall have power to apply the whole or any part of the annual income to which any object (being a minor) of the trusts and provisions hereinbefore contained shall be entitled or *presumptively* entitled in or towards the maintenance and education or otherwise for the benefit of such object, and that by applying the same personally, or by paying it to the guardian or guardians of such minor for the purpose."

It cannot be denied that the person here is a person *presumptively* entitled under the will, and therefore an object of this clause, unless there is something in the earlier part of the will to show that he is not to take the benefit of it. It does not except children who would be presumptively entitled during Mrs. Stafford's lifetime. There is no such provision. The whole will must be read together. The rents and profits are disposed of in the event which has happened in a particular way; but this must be read in connexion with the later provision which I have already read. The will must be read as a whole: and the maintenance clause is a part of it. If there were a conflict, the later clause would prevail: but I think there is none, because the accumulation clause

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must be read as applying only to income which will be available after serving the other uses of the will, and one of these is the advancement of infants presumptively entitled. The minor here clearly comes within the maintenance clause. Nothing can keep him out of the estate, if he lives to be twenty-one.

In the case of *Thatcher's Trusts* (1), decided under section 43 of the Conveyancing Act, 1881, there was a direction for the accumulation in the will similar to that in the present case; the gift was to children on attaining twenty-one or marriage, with a direction to the trustees to accumulate the interest of the minors' shares, and pay the same to them as and when their presumptive shares should become payable. Pearson, J., there says: "I am of opinion that a contrary intention is not expressed in the will, and that the trustees are authorized to apply the income in or towards the maintenance and education of the infants. The direction to accumulate is in my judgment intended to preserve the income for the infants, but not to prevent the application of it for their benefit if necessary." That does not exactly apply in the present case. I have no difficulty however in holding that the power to give maintenance here is at least a discretionary trust, and that if there had been no suit pending the trustees would have had a discretion to apply the income for the benefit of the minor, and I shall direct that they may be at liberty to apply it for his benefit. As regards the amount of the allowance asked for, I see no reason for thinking that £500 a year is an excessive sum. It is true that Dr. Stafford has a good social and official position and a fair income, but it appears from the affidavits that the minor is in delicate health and that expenses will be incurred in taking him to live abroad. Besides this he will, if he lives, be the owner of this splendid property, and entitled to an income of over £20,000 a year. Under all these circumstances I am of opinion that the allowance is a reasonable one.

Solicitor for the plaintiff: *Norris Goddard.*
Solicitors for the trustees: *Montgomery & Chaytor.*

W. L.

(1) 26 Ch. D. 426.

GREEN *v.* TODD, BURNS & CO., AND OTHERS.

(1897. No. 488.)

M. R.
1898.
Jan. 14.

Copyright —Design —Infringement —Damages —Penalties —Copyright Act, 1862 (25 *&* 26 *Vict. c.* 68), *ss.* 1, 6, 11.

Plaintiff, as the owner of a design under the Copyright Act of 1862, brought an action for damages and penalties against a firm who had inserted the design in a newspaper as a pictorial advertisement for their goods :—

Held, that plaintiff was entitled to damages for the infringement of his copyright, but not to penalties, and that, even if the defendants were, under the Act, liable to penalties, the penalties were not necessarily, and should not, under the circumstances of the case be, cumulative or in addition to damages.

A similar action against the proprietors of the newspaper, in the absence of bad faith or negligence on their part, was dismissed as against them, but without costs, as they had in their statement of defence denied the plaintiff's property in the design.

ACTION.

The plaintiff carried on the trade of a printer and lithographer at Leeds, in England. In 1896, Robert Bownas, a lithographic artist in the employment of the plaintiff, executed by the directions of the plaintiff, and for the use of the plaintiff in his business, a drawing representing "Santa Claus laden with toys, a boy and a girl running towards him and baby in a chair." On 31st October, 1896, plaintiff submitted to Todd, Burns & Company of Dublin, a sketch of a large poster suitable for the advertisement of toys, embodying the drawing previously described, with a view to obtaining an order for copies of the poster from Todd, Burns & Co. An interview on the subject took place between Mr. Scanlan, the secretary of the firm, and the plaintiff, in reference to the matter, and it was arranged that in the event of the firm purchasing copies of the poster the plaintiff would not dispose of it to any other Dublin house. Nothing was said as to whether the design was registered or not. The Court was satisfied on the evidence that the proprietary right in the design was not intended to be

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altered by the proposed sale of copies of the poster. There was some discussion between the secretary and the plaintiff as regards a smaller reproduction of the poster, and on Nov. 7th the plaintiff sent a reduction of the design adapted for a circular, and coloured by hand as a pattern. On 11th November the firm gave an order for 200 copies of the poster. The large sketch was returned, but the firm did not send back the smaller one in circular form. The copies of the poster, each containing the name of the firm of Todd, Burns & Co., and their address in large letters, were duly delivered by the plaintiff.

On 28th November, 1896, plaintiff caused copyright of the drawing to be registered at the Hall of the Stationers' Company in London, pursuant to statute 25 & 26 Vict. c. 68.

In December, 1896, the secretary of Todd, Burns & Co. called at the offices of two newspapers, and gave orders for illustrated advertisements of a sale of Christmas toys, submitting to them for that purpose the small coloured circular of the design sent by the plaintiff. The drawing as a pictorial advertisement was consequently reproduced in four issues of the *Evening Herald*, and five issues of the *Evening Telegraph*. The number of copies of the *Evening Herald* containing this advertisement were 110,900, and the number of issues of the *Evening Telegraph* 140,311.

In April, 1897, the plaintiff became aware that the drawing had been reproduced as an advertisement in the newspapers, and after some correspondence (which is sufficiently referred to in the judgment), instituted an action against Todd, Burns & Co., claiming, in addition to an injunction, damages in respect of the infringement of his copyright in the drawing, and also penalties under the statute. He alleged that in consequence of its being circulated as an advertisement in the newspapers, the drawing became valueless to him, on the ground that the trade would not order copies of a drawing which had been circulated through Ireland as an advertisement for the goods of a particular firm. The plaintiff in his evidence stated that Messrs. Atkin Brothers of Cork, who were customers of his, and had bought the poster, complained to him that it had been circulated as an advertisement in the newspapers. The cost of the production of the design was stated to be £30.

Todd, Burns & Co. traversed the title of the plaintiff to succeed, and paid into Court £5 in respect of damages, and £5 in respect of penalties.

The plaintiff also claimed damages and penalties against the proprietors of the two newspapers.

These defendants by their statements of defence denied the plaintiff's property in the design, and paid nominal sums into Court in respect of damages and penalties.

It was proved that the orders for the advertisements were received by the proprietors of the newspapers in the ordinary course of business; and the Court was satisfied that there was no negligence or bad faith on their part in the insertion of the drawing as an advertisement in their issues. The proprietors of the newspapers had offered to publish the fullest apologies to the plaintiff for what had been done.

The Right Hon. The Mac Dermot, Q.C. (with him *O'Connor, Q.C.*, and *H. Wilson*), for the plaintiff:—

The plaintiff as the person on whose behalf the design was executed is, under the Act of 1862, entitled to both damages and penalties for the infringement of his copyright. Without the knowledge or authorization of the plaintiff, Todd, Burns & Co. deliberately used his property as an advertisement of their goods. The advertisement of the drawing in the newspapers rendered it valueless to the plaintiff. The public were led to believe that there was no copyright in the design; he consequently could not make any sale of it, at least in Ireland. Even in a case where a person buys a new copyright work he is not entitled to issue a cheap popular edition. The amount of damages in this case should be assessed by the Court, taking all the circumstances into consideration. Every reproduction of the plaintiff's design in each copy of the newspapers constitutes a separate offence, and a separate penalty must be inflicted in respect of each publication. *Ex parte Beal* (1); *Melville* v. *Mirror of Life Company* (2); *Ellis* v. *Marshall & Son* (3).

The proprietors of the newspapers, by traversing the plaintiff's

(1) L. R. 3 Q. B. 387, 395. (2) [1895] 2 Ch. 531. (3) 64 L. J. Q. B. 757.

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title, have placed themselves in the same position as Todd, Burns & Co. Even if they are not liable in damages they are liable in penalties, and every copy reproducing the design is a separate offence, and for each copy published a penalty of at least one farthing must be inflicted. In *Ellis* v. *Marshall & Son* (1), Charles, J., says, in dealing with that case: —"I give no damages since they are but nominal. I have, according to the authorities, no alternative as to penalties, since each copy constitutes a separate offence."

Ronan, Q.C., and *Matheson, Q.C.*, for Todd, Burns & Co.:—

There is no case made for an injunction, as there is no ground to apprehend any further publication. The damages, if any, are merely nominal. Todd, Burns & Co. unwittingly infringed the copyright of the plaintiff. This is not a case for the infliction of penalties. Section 6 of the Act of 1862 does not apply to a case like the present. *Ellis* v. *Marshall & Son* (1) does not decide that penalties must be inflicted in every case, or that a separate penalty must *ex necessitate* be inflicted in respect of each publication of a newspaper containing an advertisement, even though it may be proved to be an infringement of somebody's copyright. The Court is not bound to give penalties in addition to damages. The sum lodged in Court is sufficient to compensate the plaintiff.

O'Shaughnessy, Q.C., and *J. J. Clancy*, for the proprietors of the *Evening Herald*:—

These defendants were wholly unaware of any copyright. There was nothing in the appearance or character of the design to induce anybody to imagine that there was any copyright in it. There was no negligence on the part of these defendants. An advertisement was brought to them for insertion, and it was impossible for them to enter into any inquiry as to copyright. The action should be dismissed as against these defendants with costs.

There is no artistic merit shown in this production. The statute only relates to works of art of some kind or other: *Nottage* v. *Jackson* (2); *Kenrick & Company* v. *Lawrence & Company* (3).

(1) 64 L. J. Q. B. 757. (2) 11 Q. B. D. 627. (3) 25 Q. B. D. 99, 102.

Ignatius O'Brien (with him *Serjeant Dodd*), for the proprietors of the *Evening Telegraph*:—

There was nothing to indicate that there was any copyright in the production. There was no negligence or want of care on the part of these defendants. There is no case against them for damages or penalties.

O'Connor, Q.C., in reply:—

Every pictorial reproduction of the plaintiff's design constituted a separate offence, and a separate penalty must be inflicted for each publication. The only option of the Court is to say what penalty is to be inflicted for each copy of the newspaper sold. *Ellis* v. *Marshall & Son* (1) decides that proposition. Section 11 of the Copyright Act of 1862 provides that damages are to be given in *addition* to penalties. The proprietors of the newspapers ought to have made inquiry as to whether there was any copyright in the design brought to them as an advertisement.

THE MASTER OF THE ROLLS:—

This action is brought by Mr. Julian Green, who is a printer and lithographer, carrying on business in Leeds, and a part of whose trade is printing pictorial posters. He has some Irish connexion, and himself travels in this country in connexion with his trade. He called on Todd, Burns & Co., before Christmas 1896, and had communications partly by interview, and partly by correspondence, with their secretary in reference to a small design, a larger sketch of which was sent over to Ireland, and with the result that 200 large posters, in size 9 feet by 6, were ordered at the rate of £6 6*s.* per 1000. It was not a very large transaction, but it resulted in Todd, Burns & Co. having 200 of these posters.

There is no doubt that this was an original design, though not a design of very high artistic order. Its originality could not be seriously contested, and a picture of high artistic merit would probably be thrown away if turned to such a purpose as this was used for. No doubt also some of the other documents produced before me, and which looked like exaggerated Christmas cards, in

(1) 64 L. J. Q. B. 757.

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one or two of their features bear more or less resemblance to the design in question, it appearing to be customary to depict Santa Claus as an old gentleman with a white beard and benevolent aspect; but that he has drawn an original design has been proved by the draughtsman who executed it, and there are some peculiarities in the drawing to which attention has been called. I am satisfied that the design is not only original, but that it is the property of Mr. Green, because, though he was not the artist himself, Bownas who drew it was paid a salary by him, and his whole time was given to his employer: and under the circumstances it could be the subject of copyright just as if Mr. Green had designed it with his own hand, because the Act provides for the case where "any painting or drawing . . . shall be made or executed for or on behalf of any other person for a good or a valuable consideration," 25 & 26 Vict. c. 68, s. 1 (Act of 1862). It was therefore the property of Mr. Green, and capable of being registered under the Copyright Act; and it was properly registered as soon as that could be done. That establishes the title of Mr. Green to the design in all its branches.

The transaction with Todd, Burns & Co. took place prior to registration: but there was no bad faith on the part of Mr. Green, and I am satisfied with the accuracy of the explanation he gave: and that the registration was effected as soon as it reasonably could be. I am satisfied also that he never did state to Todd, Burns & Co. that the design was registered under the Act, and also that on the other hand he did not state that it was not so registered. Nothing was said about registration at all. There was another discussion between him and the secretary Mr. Scanlan as regards a smaller edition of the poster in circular form, which has led only to the unfortunate result of the present litigation. This reduced design was sent over to this country and placed in the hands of Todd, Burns & Co. for the purpose of a pattern, and I think, as business men, they should have known that if they did not give an order for this smaller circular they should not have kept it in their possession, but should have returned it at once, or at any rate should not have made any use of it. But unfortunately they did not adopt this course, and their secretary has stated that he called at the two newspaper offices, and gave orders for advertisements in

their two evening papers and sent to them the very copy of the design which he had received from Green. It was thus placed in the hands of the proprietors of the *Evening Herald* and *Evening Telegraph* and was circulated as an advertisement. I am satisfied that up to this time the secretary Mr. Scanlan did not know that there was any copyright in the design, but in his evidence he gave an answer which struck me as being one of great candour. He said that he thought that to do so without getting the consent of Mr. Green, was not "fair play," and his excuse was that it was done through oversight. But he does not justify the course adopted on the ground of fair play, and it must be considered how this acts on the question of copyright under the Act, when the use of it, as an advertisement, was such as strikes an ordinary man as not being fair play. Inquiry ought to have been made as to whether Mr. Green had any objection to the publication of the design in an advertisement in the newspaper. The duty was strongly thrown on Todd, Burns & Co. to make such inquiry. They might have asked for the consent of Mr. Green. They might have said, "This cannot injure you much, but we wish to have your permission" and then they would either have had his consent to what they proposed or his refusal. In this point of view the answer of Mr. Scanlan is of great importance. The posters were not intended for Todd, Burns & Co. alone, but the design was one that might be used elsewhere, and was not intended to become the exclusive property of Todd, Burns & Co. Mr. Scanlan states that he said to the plaintiff, "Of course you will not sell the poster to another house to circulate in Dublin," and this shows that Scanlan knew that the proprietary right to sell the poster was not affected by what had been done save so far as there was an arrangement not to dispose of it to another Dublin house. I desire to add that Mr. Scanlan, though he made a mistake in this matter, seems to me to have had no bad motive, and to have acted solely in his employer's interest. He ought not to suffer in any way for what has occurred.

I have totted up the different figures of the circulation of the issues of the newspapers containing the advertisement, and it appears that the copies of the *Herald* for four days were 110,900, and those of the *Evening Telegraph* for five days were 140,311,

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making a total of the copies of the two newspapers circulated on these days of 251,211. There is nothing to show that the design would be obsolete after one year. It might be used again in 1898. Then what was the cost incurred in reference to its production by the plaintiff? He states that the cost was about £30. But what he complains of in addition to this is, that the publication injured his trade in two ways. First, he says, that people were induced to believe that there was no copyright in the design at all. I have not, however, heard that there is anyone who has been rash enough to adopt this view. Secondly, he says that his property has been injured in this way, viz. that he has lost any advantage from the stone which was used in producing the design, because Messrs. Atkin, Brothers, of the city of Cork, who were customers of his said to him, "You have sold us these posters, and here they are circulating in the Dublin papers."

I regret when complaint was made by the plaintiff that it was not received in a better spirit by Todd, Burns & Company. A letter from them was sent to him. It does not say that the advertisement had appeared in two other editions of the *Herald*, and nothing was said about the *Evening Telegraph*, nor did they say, except in a hypothetical way, that they were sorry for what had occurred; in effect they said, "we are not willing to pay any money, as no injury has been done to you." Scanlan thought that it would have been better if the plaintiff had been told fully that the advertisement complained of had been inserted in four copies of the *Herald*, and also in five copies of the *Evening Telegraph*. If that course had been adopted and they had offered to pay a small sum for damages, very likely this action would not have been brought.

The case of the plaintiff has been presented in a double aspect, first, as regards the damages which he claims for alleged injury; and, secondly, with reference to the penalties under the Act of Parliament; and I am asked to treat the penalties as a different thing from the damages.

As to the newspapers, I cannot see why they have been brought here at all. I do not think the action ought to have been instituted against them, because there was an utter absence of bad faith or negligence or any personal benefit to result to either

of them from the transaction, except what occurs in the ordinary course of business. All they knew was that a design was sent to them to copy, and there was nothing to indicate to them that there was any such person in existence as Green. There was nothing in the æsthetic aspect of the document to indicate that it might probably be claimed as an original design. A very commonplace advertisement of goods was brought to them with an illustration to attract the notice of the public. I agree fully with Mr. O'Shaughnessy that there was nothing in the aspect of the advertisement, or the design, or the document, to lead any human being (who did not know the contrary) to suppose that there was any special property in it. Under these circumstances what are the proprietors of newspapers to do? Are they to insist on having an abstract of title with every advertisement of the kind that is brought to them for insertion, or are they to make negative searches in the copyright department of Stationers' Hall, in order to see that such a design has not been registered by anyone? I cannot see how they are bound to do that. They are impleaded here for what was at most a mere mistake without negligence, and in a case where there was nothing to put them upon inquiry. But having made the mistake, if it can be called such, of inserting an illustrated advertisement, it is now sought to mulct them in penalties. It has been pressed by plaintiff's counsel that they must be held liable in penalties, and that there must be at least the minimum penalty of one farthing inflicted in respect of each and every offence. And having regard to the fact that these are halfpenny newspapers, and that of course they must be sold to newsagents, &c., at a considerable discount from that price, the result of assenting to this proposition would be not only that the profit arising from the sale of these copies of the papers containing the advertisement would go to Mr. Green, but that almost the whole gross sums received by the proprietors at that particular time would go into his pocket. There can be no damages recovered against the newspapers in this case on the ground of privity of contract. Then the question is, am I bound to give penalties against them? The section of the Act dealing with this matter is a peculiar one. It seems to me that it is essential that something should be done by the party to be penalized, which can be met by a mixture of compensation and

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punishment. That is what penalty implies. There is no penalty intended to be applied except there is some impropriety of conduct. I am sure this is what the section intends. In this case the proprietors of the newspapers offered to insert and publish the fullest apology for what had been done. There is no *mens rea*. It is not a case in which they should be compelled to pay £260 odd, taking the penalties at the minimum rate. The maximum penalty shall not exceed £10, or "double the full price, if any, at which all such copies . . . shall have been sold or offered for sale." The copies in question were only a part, and a very small part, of a newspaper, which, as a whole, was sold for one halfpenny, or less. I do not believe that I am compelled to give a penalty in the case at all as regards either of the newspapers. They have both paid money into Court, and they are entitled to have the case dismissed; and I would have done so with costs, but that in their defences they have denied the plaintiff's property in the design. As against them the action will be dismissed, but without costs.

As regards Todd, Burns & Co. the case is different. They were under a contractual obligation to the plaintiff. They were in the wrong, and they must pay damages. It is another question whether they are also liable to penalties. I think the clause referred to by Mr. O'Connor, giving damages as well as penalties, has no application, and that it is not meant that both damages and penalties can necessarily be recovered by the registered proprietor of a copyright, because penalties are given to the "person aggrieved," and not to a common informer. Why is this? It must be in order that he may be compensated for that in which, if it were a criminal offence, he could have no interest, except as one of the public. The whole penalty goes to the person aggrieved. No one else can sue for it. Although strictly *nomine pœnæ*, I think that the whole scope of the enactment points at compensation to a person whose property has been improperly interfered with. If I am wrong in this, the materials for calculating the amount of the penalties are before me, and the amount can be readily assessed by a Court of Appeal. There were 110,900 copies of the *Evening Herald* containing this advertisement and 140,311 copies of the *Evening Telegraph* with the same insertion. That made a total of 251,211 copies of the two

papers for which Todd, Burns & Co. would be liable (if I am wrong in the view I take) at the minimum rate of one farthing for each copy; and it is not suggested that they should be held liable at the maximum rate of penalty (£10). There are some expressions of Charles, J., in *Ellis* v. *Marshall & Son* (1) which would seem to indicate a view that in a case like this there must be a penalty at any rate inflicted, and it appears in that case that the sum allowed for penalties by him when computed must have been assessed at one farthing in respect of each separate offence. I recognise the argument put forward on that ground, that every advertisement constitutes a violation of the plaintiff's right, and must be the subject of a separate penalty. I do not think that Charles, J., has so decided. His observations must be taken in reference to the case before him. Ellis in that case was the proprietor of a photograph of Miss Mary Moore, and the Marshalls published, and improperly (and therefore illegally) reproduced this photograph in copies of their magazine. It was not the case of a man who takes an advertisement and gives it to a publisher.

The 6th section of the Copyright Act of 1862 (25 & 26 Vict. c. 68) provides:—"If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or knowing that any such repetition, copy, or other imitation has been unlawfully made shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding ten pounds; and all such repetitions, copies,

(1) 64 L. J. Q. B. 757.

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and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright."

That is the section. I think its provisions as to penalties are pointed at the person, who by himself or somebody else publishes a copy or imitation of some work or design unlawfully made, and does not apply to a case where a person gives an advertisement to a newspaper. He has no control over the newspaper, or the number of copies issued, and in such case I do not think he is necessarily obliged to pay a penalty in respect of each and every separate copy of the paper which contains the advertisements. Even if he were liable to penalties, I do not think that they ought to be cumulative or in addition to damages.

As to damages (which the parties have asked me to assess, if there are to be damages), the evidence given is somewhat loose, but I am satisfied that the proprietor of this design has been injured so far as the sale in Ireland is concerned, and that to a large extent the work of the plaintiff in reference to it has been thrown away so far as concerns Irish sales, and that he has lost to a considerable extent the cost incurred in reference to the preparation of the poster. I will not give any fancy damages, on the ground that he has been held out to the public as being a person who had no proprietary right in the design, and I do not hold that he is entitled to any substantial damages over and above those arising out of the particular transaction in question. I think in the estimation of damages it must be taken into account what he spent on the stone used in the production of the design, the period at which it was brought out, the fact and circumstances of the violation of his copyright, and the consequent injury that may have taken place as regards his trade in the year 1897. On the whole, I estimate the damages as fifty guineas, which will include the £5 lodged in Court. This I regard as full and ample compensation, erring if at all on the side of excess.

Solicitors for the plaintiff: *Larkin & Co.*

Solicitors for Todd, Burns & Co.: *J. L. Scallan & Co.*

Solicitor for the proprietors of the *Evening Herald: W. T. Sheridan.*

Solicitors for the proprietors of the *Evening Telegraph: J. L. Scallan & Co.*

R. W. L.

MARY KENNEDY *v.* JOSEPH CAMPBELL AND PATRICK CAMPBELL.

Kenny, J.
1898.
Nov. 22.

Principal and surety—Surety's right to all securities held by creditor—Mercantile Law Amendment Act—Mortgage security—Estate or interest in land—Judgment Mortgage Act.

Although in cases where a creditor holds, as security for his debt, a mortgage on the lands of the principal debtor, a surety on paying off the debt is entitled to a transfer of the mortgage, yet, until an actual transfer to him of the security, or a judgment of a Court declaring him entitled to such transfer, he has no such estate or interest in the lands as would be affected by a registration of judgment against him under the Judgment Mortgage Act.

THIS was an appeal from a dismiss of His Honor the Recorder of Londonderry, dated the 1st July, 1898, in favour of the defendants in a mortgagee's suit (commenced by equity civil bill) to raise the amount of a judgment mortgage registered by the plaintiff againt all the estate and interest of the defendant Patrick Campbell in certain lands in the county of Londonderry. The appeal came before Mr. Justice Kenny at the Londonderry Summer Assizes of 1898, when he reserved judgment. The facts of the case appear from the judgment of the learned Judge delivered in Dublin, November 22, 1898.

D. S. Henry, Q.C., and *Glover*, for the plaintiff.

J. O. Wylie, Q.C., for the defendants.

KENNY, J.:—

This case came before me at the last Summer Assizes at Londonderry. It was an appeal from a dismiss of the Recorder dated the 1st July, 1898, in favour of the defendants in an ordinary mortgagee's suit to raise the amount of a judgment mortgage registered by the plaintiff aginst "all the estate and interest" of the defendant Patrick Campbell in certain lands called Ballygillanbeg, in the county of Londonderry. There were two questions discussed

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in the case. The one—a question of fact—namely, whether in the transaction to which I shall shortly refer, the defendant Patrick Campbell was to be regarded as a surety for his brother the defendant Joseph Campbell, and the other a question of law, namely, whether the equitable right to a transfer of the securities held by a creditor to which a surety becomes entitled under the provisions of the Mercantile Law Amendment Act when he pays off the debt of the principal debtor, can be regarded as an interest capable of being affected under the Judgment Mortgage Act when the security held by the creditor is a mortgage on the lands of the principal debtor.

By a conveyance dated the 1st April, 1889, the defendant Joseph Campbell acquired a fee-simple property called Ballygillanbeg, in the county of Londonderry. By statutory mortgage of the following day, the 2nd April, 1889, made between the two defendants of the one part and Robert M'Guckin of the other part, the defendants conveyed to M'Guckin by way of mortgage to secure £120 stated to be paid to both of them, (1) the farm of Lower Mullan, and (2) the said farm of Ballygillanbeg. The deed stated that both farms were in the possession of the two defendants.

The defendant Patrick Campbell subsequently sub-mortgaged Lower Mullan to one Alexander Johnson, and the latter having in the year 1896 instituted proceedings in the County Court against the defendant Patrick Campbell to realize this sub-mortgage, the said lands of Lower Mullan were sold under the decree of the County Court Judge, and out of the proceeds of such sale the amount of the prior mortgage of the 2nd April, 1889, to M'Guckin, which was secured on both Lower Mullan and Ballygillanbeg, was paid off.

On the 28th September, 1897, the plaintiff in the present suit registered a judgment obtained by her against the defendant Patrick Campbell, as a mortgage against the lands of Ballygillanbeg.

Oral evidence was adduced for the purpose of showing that the lands of Lower Mullan which were sold were the property of Patrick, and that in the mortgage of the 2nd April, 1889, he was only a surety for his brother Joseph. At the conclusion of the

hearing at Londonderry I announced that on the question of fact, namely, the suretyship of Patrick, my decision was in favour of the plaintiff, and I reserved for consideration the somewhat novel point of law which I have stated at the commencement of this judgment.

Assuming then that Patrick Campbell was a mere surety for Joseph Campbell, the former, having out of the proceeds of the sale of his lands of Lower Mullan paid the debt to M'Guckin, became entitled to have assigned to him or to a trustee for him every security which was held by M'Guckin in respect of the debt so paid off, and to stand in the place of M'Guckin, and to use all the remedies of the latter, in order to obtain from Joseph indemnification for the loss sustained (19 & 20 Vict. c. 97, sect. 5). That is, he had an equitable right to obtain an assignment of the mortgage of the 2nd April, 1889, affecting the lands of Ballygillanbeg. The plaintiff contends that such a right comes within the 6th and 7th sections of the Judgment Mortgage Act (13 & 14 Vict. c. 29). The 6th section provides for the contents of the affidavit necessary for registration of the judgment. The deponent is to state to the best of his knowledge and belief that the defendant "is at the time of the swearing of such affidavit, seized or possessed at law, or in equity" of the particular "lands, tenements, or hereditaments," or has a disposing power over same, which he may without the assent of any other person exercise for his own benefit. By the 7th section the registration of such affidavit "shall operate to transfer to and vest in the creditor registering such affidavit all the lands, tenements, and hereditaments mentioned therein *for all the estate and interest* of which the debtor mentioned in such affidavit shall at the time of such registration be seized or possessed at law or in equity, or might at such time create by virtue of any disposing power," and such creditor is to have "all such rights, powers, and remedies whatsoever, as if an effectual conveyance, assignment, appointment, or other assurance to such creditor of all such estate or interest, but subject to redemption as aforesaid, had been made, executed, and registered at the time of registering such affidavit." It will thus be seen that the debtor must have an "estate or interest" at law or in equity in the lands

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in order that the section may operate. A number of possible cases capable of arising under the section, might be put. Does the interest of a debtor who is equitable mortgagee by deposit of deeds —or whose interest is a vendor's lien for unpaid purchase money— or that of a salvagor—come within it? I offer no opinion on these cases, though I feel that the present has many features in common with them. Unquestionably the interest of a debtor who is judgment mortgagee comes within the section. This has been so decided by the Vice-Chancellor in *Rossborough* v. *M'Neill* (1), when he held, and, if I may be allowed to say so with regard to a Judge whose opinion I value so highly, correctly, that the judgment creditor, No. 2, was by the statute invested with the estate and interest of judgment creditor No. 1 in the lands, whether that interest was legal or equitable, just as if the debtor (that is judgment creditor No. 1) had conveyed the same to him by deed of mortgage. In that case it will, however, be observed that judgment creditor No. 1 had an actual "estate or interest" in the lands under his own judgment mortgage, which might be the subject matter of a conveyance or mortgage by deed. In *Rae's Estate* (2), the question was also discussed. There a testator devised lands to his wife for her life for the benefit of her children, so that she had a complete discretion as to the application of the rents for their benefit generally, and so that no one of the children had any specific interest capable of disposition in any part of the estate, and the testator directed that after her death the lands should be sold, and the proceeds divided amongst such of the children as should be living at the time. Judge Ormsby held that the children had no "interests" in the lands on which the registration of a judgment in the mother's lifetime could operate. Somewhat similar language to the 7th section of the Act is contained in the 1 & 2 Vict., c. 110, section 13, and there have been several decisions on the construction of the latter. It has been held not to extend to an ecclesiastical benefice (*Hawkins* v. *Gathercole* (3); *Long* v. *Storie* (4)), or to a share in the proceeds of land devised on an absolute trust for sale (*Thomas* v.

(1) 23 L. R. Ir. 409.
(2) 1 L. R. Ir. 174.
(3) 6 D. M. & G. 1.
(4) 3 De G. & S. 308

Cross (1)). It is not therefore in my opinion every "right" as against land that can be regarded as an "interest" in the lands within the section of the Judgment Mortgage Act. Some "rights" might no doubt ripen into "estates or interests," but until they assume the character of the latter, it is difficult to see how in their inchoate state they can come within the statute. The Mercantile Law Amendment Act gives a surety a statutable right, which, without the Act, a Court of equity would have worked out for him in a properly constituted suit. But in either case—if there be no voluntary transfer of securities—a suit is necessary in order to put the creditor in privity with the lands, or to clothe him with any estate or interest in them. Until actual transfer to him of the security, or until a judgment of a Court declaring him entitled to such transfer, I am of opinion that he has no such estate or interest in the lands as would be effected by the registration of a judgment under the Act.

I therefore affirm the decision of the Recorder, and dismiss the appeal.

Solicitor for the plaintiff: *R. M'Guckin.*
Solicitor for the defendant: *W. J. Venables.*

J. M'G.

(1) 2 Dr. & Sm. 423.

Ross, J.
1898.
July 13.

Appeal.
Oct. 26.

In the MATTER of DRAKE'S ESTATE; PEART, Petitioner.

Land Law, Ireland, Act, 1896, *s.* 40—*Request—Court tenant—Accelerating sale.*

The circumstance that an existing Court tenancy would probably expire before the estate would automatically appear in the Judge's list for consideration under the Land Law, Ireland, Act, 1896, s. 40, is not of itself a sufficient reason for accelerating the issue of a request.

Application on behalf of G. L. Walker, a Court tenant on the estate, for a request to the Irish Land Commission under sect. 40, of the Land Law (Ireland) Act, 1896. The ground upon which it was sought to accelerate the sale was that the tenancy would expire before the case would automatically appear in the Judge's list.

P. A. O'C. White, in support of the motion:—

The tenant, though he holds under a letting from the Court, is entitled to the benefit of the section: *Owen's Estate* (1). [Ross, J.: What special ground do you suggest for taking the case out of its turn?] The tenant has an interest in the sale. His interest will be defeated if the sale be not accelerated, and that is a sufficient reason for issuing the request at once.

D. F. Browne, for the petitioner having carriage, said that all the incumbrancers were opposed to the motion.

Ross, J.:—

What was laid down by the Court of Appeal in *Owen's Estate* (1) is in substance that Court tenants, who hold pending the matter, are to be treated for the purposes of the 40th section, as having the same interest in the sale as other tenants.

(1) [1897] 1 I. R. 200.

Ross, J. 1898.

In re DRAKE'S ESTATE.

But what is the interest of the tenant? Interest in a sale if a sale there is to be. It may be that there need never be a sale. It may be that the incumbrances will be paid off before a sale takes place. In such a case the tenant has no ground for complaint. It turns out in this particular case that this Court tenancy will expire in the beginning of next year, and the tenant comes in and applies that the case may be taken out of its turn. He is not supported by any one interested in the estate. If those interested in the estate were insisting on a sale, I should be obliged to sell, and the Court tenant would get the advantage of their urgency. Again, if the case appeared in the list automatically, I should probably not postpone the sale till the tenancy expired. But in applying to accelerate the proceedings, the tenant has no right to call on me to exercise my discretion in his favour to the prejudice of those interested in the estate who strongly oppose his application. If he happens to occupy as tenant when the sale takes place in ordinary course, he will have the advantage of an offer under sect. 40.

But I cannot, merely because his tenancy is likely to expire, prefer this estate to those that are longer in Court, in cases where incumbrancers are pressing for a sale.

W. G.

Appeal. Oct. 26.

The appellant appealed to the Court of Appeal (LORD ASHBOURNE, L.C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.).

The Right Hon. C. H. Hemphill, Q.C. (with him *P. A. O'C. White*), for the appellant.

The COURT, without calling on *D. F. Browne*, for the respondent, dismissed the appeal with costs.

Solicitor for Mr. Walker: *J. C. Sullivan.*

Solicitor for the petitioner having carriage: *James Goff.*

G. Y. D.

V.-C.
1898.
June 21.

M'LEARN *v.* COOKE AND OTHERS.

(1897. No. 347.)

Practice—Party and party costs—Allowance of third counsel—Discretion of Taxing Master.

The costs of a third counsel, as between party and party, should be allowed as a general rule, save under special circumstances, as where the case is of such small importance as to render the allowance unjustifiable.

SUMMONS TO REVIEW TAXATION.

This was an action to compel specific performance of a contract for a sum of £1000 which had been entered into by the defendants, who were promoters of a Tramway Company in Londonderry. The defendants had agreed with the plaintiff to purchase certain omnibuses of which he was the proprietor for a sum of £1000, £800 to be paid in cash, and £200 in shares in the new Company. The plaintiff recovered judgment for the full amount with costs. At the hearing of the action the plaintiff was represented by three counsel and the defendants by two. On taxation of costs the Taxing Master declined to allow the plaintiff the costs, as between party and party, of a third counsel. In his report he did not specify any special reasons for so doing, but merely stated that he considered a third counsel unnecessary, and that he disallowed the costs in the exercise of his discretion.

J. W. Bird, for the plaintiff :—

The Taxing Master has not given any reason for disallowing the costs of a third counsel beyond stating that he considered a third counsel unnecessary. The case was a substantial one, and a long defence, signed by senior counsel, was filed by the defendants raising every possible issue.

In the Common Law Division it is the settled practice to allow a third counsel as a general rule except where the cause of action

is trivial: *O'Meara* v. *Barry* (1); *Phelan* v. *Knaresborough* (2); *M'Bride* v. *M'Bride* (3). In *O'Meara* v. *Barry* (1) the action was only for £100 damages; in *Phelan* v. *Knaresborough* (2) the judgment was for £274 and costs; in *M'Bride* v. *M'Bride* (3) the question raised was one of title, and nominal damages only were awarded, while the defendant did not appear. In all these cases a third counsel was allowed. In the Chancery Division a third counsel was allowed in an action brought to redeem a policy of insurance which was effected for the purpose of securing a sum of £90: *Mahalm* v. *M'Cullagh* (4).

The English practice is no doubt different, but there the counsel gives his entire attention to the case, and the scale of fees is much larger than in Ireland.

A. Todd, for the defendants:—

The matter is entirely in the discretion of the Taxing Master, and the Court will not interfere with the exercise of that discretion unless it is plainly wrong. Only two witnesses were examined on both sides, and the case was a short one. To justify a third counsel there must be special circumstances. As regards the discretion of the Taxing Master, see *Haslam* v. *O'Connor* (5); *Aaron's Reefs* v. *Twiss* (6). In England, unquestionably, only two counsel are allowed as a general rule: Morgan & Davy on Costs, p. 491; *The Attorney-General* v. *Munro* (7); *Smith* v. *Buller* (8). In the present case the defendants were only represented by two counsel, whereas there were three counsel on both sides in the cases cited by Mr. Bird.

Bird, in reply:—

It is impossible to minimise the importance of the action, having regard to the large amount recovered. Moreover, the defence was signed by senior counsel. The question is not one of discretion but of principle.

(1) [1895] 2 Ir. R. 454.
(2) *Ibid.* 456.
(3) [1894] 2 Ir. R. 76.
(4) 31 L. R. Ir. 147.
(5) Ir. R. 6 Eq. 615.
(6) [1894] 2 Ir. R. 242.
(7) 1 Mac. & G. 213.
(8) L. R. 19 Eq. 473.

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THE VICE-CHANCELLOR:—

When this case, which is in reference to the refusal of the Taxing Master to allow the costs of a third counsel, was first opened, I must say I was surprised at this disallowance, as the case was one in which, in my opinion, a third counsel should be allowed as a matter of course. The Taxing Master has given no special reasons for his ruling, but has merely stated that he acted in the exercise of his discretion, but this exercise is not to be arbitrary, but is subject to be reviewed by the Court. The practice has been laid down by the Queen's Bench Division in *O'Meara* v. *Barry* (1), that in substantial cases a third counsel, as a general rule, should be allowed, and I think a third counsel should be allowed in the Chancery Division; save under special circumstances, where the case is of such small importance as to render it unjust to the defeated party to make him bear the costs of a third counsel.

The English practice and system are in this respect very different from ours. In England, the leading counsel acts all through the case. He receives larger fees; he opens the case, and he alone replies. Moreover the amount of business there is such as to sufficiently remunerate him for confining his practice to one particular Court, and the fees paid are larger than those usually paid in this country. I am of opinion, that in this Division also, as a general rule a third counsel should be allowed. This being so, it is incumbent on the Taxing Master to state some special grounds for disallowing a third counsel. He has not done so, nor did any such grounds exist. He must therefore review his taxation by allowing the costs of a third counsel.

Solicitor for the plaintiff: *Stewart Ross.*
Solicitor for the defendant: *Todd.*

J. MAC M.

(1) [1895] 2 Ir. R. 454.

RAMSAY *v.* SIMPSON.

(1893. No. 597.)

V.-C. 1898. July 18.

Executor—Administration action—Manager appointed by the Court—Costs—Priority—Practice.

Where in an administration action a manager has been appointed, the costs incurred by him with the sanction of the Court take priority over all other costs, except the costs of the executor and the costs of the realisation of the assets.

THIS was an action brought by the plaintiff as legatee to administer the estate of Robert Simpson, who was a plumber and contractor. By his will his executors were directed to carry on the business after his death, which event occurred on the 14th of June, 1879. On the 15th of November, 1893, an order was made for the administration of the real and personal estate of the testator, and on the 25th of June, 1894, James Simpson was appointed manager. On the 9th of November, 1896, the manager applied to the Court for directions, and an order was made authorizing him to proceed for the recovery of a number of debts due to the business, and at the same time to proceed with an action which had been instituted in July, 1894, to recover the sum of £668, being the balance claimed in respect of certain gas works executed for the Trim Commissioners. This action resulted in a verdict for the plaintiff for £200, but the defendants recovered £410 on a counterclaim, and accordingly a verdict was entered for the defendants for £210, with costs. The Divisional Court directed a verdict for the plaintiff for £130 on a review of the whole case, but the original verdict was restored by the Court of Appeal. By an order on further consideration, dated the 18th December, 1895, the plaintiff was declared entitled to his costs, and by an order dated the 4th July, 1898, the manager was declared entitled to costs necessarily and properly incurred by him.

The fund in Court being insufficient for the payment of the

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costs of the parties and the costs of the manager, the present motion was instituted by the manager for the purpose of having it determined in what priority the costs incurred by him should be paid.

O'Connor, Q.C., and *Maxwell*, for the manager James Simpson:

The manager is entitled to be paid his costs in priority to those of the parties to the action except the costs of the executor and the bare costs of the realisation of the assets: *Batten v. The Wedgewood Coal and Iron Co.* (1).

Matheson, Q.C., and *Arthur Murray*, for the plaintiff:—

The Court has no power to vary an order on further consideration so as to give the costs awarded under a subsequent order priority over those already awarded: *Swale* v. *Milner* (2); *Le Grand* v. *Whitehead* (3); *Lyne* v. *Lyne* (4). In *Blenkinsop* v. *Foster* (5) liberty to apply was specially reserved; in *Gaunt* v. *Taylor* (6) the order sought for was not inconsistent with that made on further consideration, while in *Young* v. *Everest* (7) there had not been any order on further consideration.

Maxwell, in reply:—

If the order, on further consideration, could have affected the manager's priority he should have had notice of it. In the present case liberty to apply was reserved, and therefore *Gaunt* v. *Taylor* (6) is a direct authority in favour of the manager. It was not necessary for the manager to apply at all for costs necessarily and properly incurred by him: *Fitzgerald* v. *Fitzgerald* (8). According to the principle laid down in *Batten* v. *The Wedgewood Coal and Iron Co.* (1), a creditor's costs would be postponed to those of a manager. Here the plaintiff is only a legatee, and therefore this is an *a fortiori* case.

(1) 28 Ch. D. 317.
(2) 6 Sim. 572.
(3) 1 Russ. 309.
(4) 8 De G. Mac N. & G. 553.
(5) 3 Y. & C. (Ex.) 205.
(6) 2 Hare, 413.
(7) 1 Russ. & M. 426.
(8) 5 Ir. Eq. R. 525.

THE VICE-CHANCELLOR:—

This is a very unfortunate case, as the amount of the fund in Court does not even admit of all the parties getting paid their costs in full, and the question is how the payment of those costs is to be provided for.

I shall direct the payment of the costs in the following order, viz. first, the costs of the executrix; secondly, the costs of the realization of the assets, by the sale of the premises; thirdly, the costs of the manager (including the costs of the action against the Trim Commissioners); fourthly, the costs of the other parties rateably.

The principle I go on is that the manager is entitled to be indemnified for costs incurred by him under the sanction of the Court.

Solicitor for the manager: *Figgis.*
Solicitor for the plaintiff: *Martley.*

J. MAC M.

IN THE MATTER OF THE VENDORS AND PURCHASERS ACT, 1874, AND OF A CONTRACT OF SALE BETWEEN JOHN BISHOP AND MARGARET RICHARDSON.

M. R. 1898. March 29.

(1898. No. 219.)

Vendor and purchaser—Sale of yearly tenancy—Will—Construction—Gift of chattels real to A. for life, and at his decease "to his eldest son or heir-at-law."

A testator devised and bequeathed his lands at A. (held from year to year) to his son J. for life, and at his decease to his eldest son or heir-at-law. J., who had gone into possession of the lands on his father's death, and had an eldest son living, agreed to sell the lands to B. B. objected to the title on the ground that A. took a life interest only under the will:—

Held, that J. took only a life estate in the lands, with remainder to his eldest son or heir-at-law as *persona designata*, and that therefore the vendor could not make title:—

Smith v. *Butcher* (10 Ch. D. 113) followed.

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In re Bishop and Richardson's Contract.

Summons.

This was a summons by John Bishop, the vendor, under the Vendor and Purchaser Act, 1874, for a declaration that a good title was shown to the farm and lands of Anna, in the barony of Coshlea, and county of Limerick.

Margaret Richardson, who had agreed to purchase the lands for £1000, objected to the title on the ground that John Bishop took only a life estate in the lands under the will of his father John Bishop. John Bishop, the father, died in 1859, having made his will in December, 1858, the material portion of which was as follows:—

"My dwellinghouse and premises in Galbally, together with the five plantation acres adjoining the same, as also the household furniture in said house, my farms of land at Curraturk, and all the cows on said farm, these I bequeath to my beloved wife Alice during her natural life, and at her death, or if she should think proper to marry, the same to revert to and become the property of my son Henry, for and during his natural life, and on his death to go to his next heirs if he die without making a will, and in the event of his making a will, then to go and be disposed of subject to such appointment as he may so by will make; and in the event of my son Henry not marrying during his life and not leaving any heir of his body behind him, then the property so hereby vested in him to go to my son John for his life, and at his death to his eldest son or heir-at-law in case he shall die intestate, but in the event of his making a will, then subject to the appointment to be so made by his said will.

"I bequeath to my said son Henry the Mill Farm, the mill built thereon, and the machinery and everything appertaining thereto, situate at Araken, and adjoining the town of Galbally, as also my farms and lands at Park and Garnaline, and the profit rent I derive therefrom for and during his natural life, and on his death to go to his eldest son or heir-at-law in the event of his dying intestate, but in case he shall make a will, and at his death shall have been married, and have lawful issue, then to go subject to the appointment so to be made by said will; and in the event of his not having at the time of his death any lawful heir him surviving, then the property so hereby devised to him to go to my

son John for his life, and at his death to go to his next heir or eldest son. *I devise and bequeath my farm and lands at Anna and Ryefield to my son John for life, and at his decease to his eldest son or heir-at-law.*

"I likewise hereby transfer to him the said John my right and interest of, in, and to a sum of £500, which Lord Guillamore, the landlord of the said farm of Anna, owes me. I nominate as executors of this my will the Rev. Henry A. Sadlier, John Butler Massey, junior, and my beloved wife Alice."

The testator's son John Bishop entered into possession of the farm of Anna, which had been held by the testator as tenant from year to year, and in the month of June, 1893, had a fair rent fixed in his own name. His eldest son Henry Bishop was alive, aged twenty-four years, and was a person of weak mind.

Ignatius O'Brien, for the vendor:—

The intention of the testator, which is to be gathered from the whole of the will, was to give the absolute interest in this farm, which was a chattel interest, to his son John. The words used by the testator are peculiar, but he probably did not understand the use of technical terms, and considered that some words were necessary to be added in order to give an absolute interest. The words used are equivalent to a gift to John for life, and after his death to the heirs of his body, which would give an estate tail in realty, and therefore an absolute interest in personalty.

William Carrigan, for the purchaser:—

The title cannot be forced on the purchaser unless it is clear that the vendor took an absolute interest. The intention, on the contrary, was to give the property to the vendor for life, and after his death to his eldest son, if he had one. There is an eldest son, but he is not a party to the sale. If there were daughters, and no son, they would take as *personæ designatæ*.

The following authorities were cited:—*De Beauvoir* v. *De Beauvoir* (1); *Robinson* v. *Robinson* (2); *Powell* v. *Boggis* (3); *Ousby* v. *Harvey* (4); *Britton* v. *Twyning* (5); *Atkinson* v. *L'Estrange* (6);

(1) 3 H. L. Cas. 524.
(2) 1 Burr. 38.
(3) 35 Beav. 535.
(4) 17 L. J. Ch. 160.
(5) 3 Mer. 182.
(6) 15 L. R. Ir. 340.

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In re Russell (1); *Herrick* v. *Franklin* (2); *Smith* v. *Butcher* (3); *In the Goods of Dixon* (4); *Kirkpatrick* v. *King* (5); Jarman on Wills, 5th ed., p. 1376, note (*c*).

The Master of the Rolls:—

This case comes before me on a summons under the Vendor and Purchaser Act with reference to a contract of sale between John Bishop and Margaret Richardson, the summons having been taken out by John Bishop, the vendor. The subject-matter of the sale was a farm of land called Anna, in the county Limerick, which was, and always had been, of chattel tenure. The question turns on the will of John Bishop (the father of the vendor), made in December, 1858, and proved in 1859. The words of the will containing the bequest of the lands of Anna to the vendor are as follows:—"I devise and bequeath my farm and lands at Anna and Ryefield to my son John (*i. e.* the vendor) for life, and at his decease to his eldest son or heir-at-law." The vendor claims an absolute interest in the farm of Anna on the ground that the words are such as would create an estate tail in him if the lands were real estate, and that, therefore, being personal estate, he took an absolute interest in them. If there was nothing else in the will to explain the meaning of the words used by the testator in this bequest, the vendor's contention would not, in my opinion, be tenable, because the gift of the farm to John would be nothing else than a gift of a life interest in a chattel, which the law permits, followed by a gift after his death to a particular person, namely, his eldest son or heir-at-law as *persona designata*. But these are not the only words in the will; there are other parts of it to which reference must be made, for to use the expressive phrase of Mr. O'Brien, the testator has "peppered" the will over with the word "heirs," without any due regard to its real meaning. Before referring to these, I must dispose of the contention of Mr. O'Brien, founded on the clause which immediately follows the gift of the farms. It runs thus:—"I likewise hereby transfer to him the

(1) 53 L. J. Ch. 400; 51 L. T. 559.
(2) L. R. 6 Eq. 593.
(3) 10 Ch. D. 113.
(4) 4 P. D. 81.
(5) 32 Ir. L. T. R. 41.

said John my right and interest of, in and to a sum of five hundred pounds sterling, which Lord Guillamore, the landlord of the said farm of Anna, owes me." Mr. O'Brien relied on this clause as explaining the previous one, and indicating an intention of the testator to give the farms of Anna and the money due by the landlord of it to one and the same person absolutely. But I do not think that it throws any light on the previous clause. The word "likewise" only means "also," and does not mean "in like manner," or anything of that kind. The testator may well have intended to give the money to John absolutely; but not the lands. But in the earlier part of the will the testator deals with other farms which were chattel interests also. The first bequest is as follows:—"My dwellinghouse and premises in Galbally, together with the five plantation acres adjoining the same, as also the household furniture in the said house, my farms of land at Curraturk, and all the cows on said farm, I bequeath to my beloved wife Alice during her natural life, and at her death, or if she should think proper to marry, the same to revert to, and become the property of, my son Henry, for and during his natural life, and on his death to go to his next heirs, if he die without making a will; and in the event of his making a will, then to go and be disposed of subject to such appointment as he may so by will make; and in the event of my son Henry not marrying during his life, and not leaving any heir of his body behind him, then the property so hereby vested in him to go to my son John for his life, and at his death to his eldest son or heir-at-law in case he shall die intestate, but in the event of his making a will, then subject to the appointment to be so made by his said will."

It is plain that in this context the testator uses the words "next heirs" as equivalent to "heirs of the body," for he provides for the event of Henry dying without leaving any heirs of his body. Thus, in that event, John takes only for life, and at his death his eldest son or heir-at-law. This shows that the term "heir-at-law" is used here as equivalent to "heir of the body." It is difficult, however, to say what he means by "*or* heir-at-law." It cannot mean any person other than an eldest son; it probably means eldest son, if he has one; if not, the heir or heirs of his body, that is a child or children. The testator goes on to give to

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his son Henry a mill farm and other lands (also chattel interests) "for and during his natural life, and on his death to go to his eldest son *or* heir-at-law in the event of his dying intestate; but in case he shall make a will, and at his death shall have been married, and have lawful issue, then to go subject to the appointment so to be made by said will; and in the event of his not having at the time of his death any lawful heir him surviving, then the property so hereby devised to him to go to my son John for his life, and at his death to go to his next heir or eldest son." The gift over here is to Henry's brother John, who would be his collateral heir. The expression "lawful heir" here cannot mean "heir general," but must mean "heir of the body," and so the words "next heir" must have the same meaning. All these bequests which I have read precede the gift to John, on which the question turns. "I devise and bequeath my farm and lands at Anna and Ryefield to my son John for life, and at his decease to his eldest son or heir-at-law." No power of appointment is expressly given to John as to these lands, but the language of the gift is similar to those of the gifts to Henry and John which I have read. I think that the testator intended in this as in the prior gifts to give an estate for life to John, otherwise the superadded power of appointment in the prior gifts would have been useless. It is to be noticed that it is not a general power of appointment by deed or will, but a testamentary power. This strengthens the view that all that the first taker was to take was an estate for life. During the argument, I referred to the case of *Robinson* v. *Robinson* (1) as affording some ground for the vendor's contention, as in that case the word "son" was held to be capable of being used as a *nomen collectivum*, and equivalent to "issue male." There the testator devised his real estate to L. for the term of his natural life . . . and after his decease to such son as he should have lawfully to be begotten, and for default of such issue, then to W. in fee. It was held that L. must by necessary implication, to effectuate the manifest general intention of the testator, be construed to take an estate in tail male. If the words here had been "and at his death to his eldest son," omitting the words "or heir-at-law," there

(1) 1 Burr. 38.

would have been some ground for contending that *Robinson* v. *Robinson* (1) applied. But it is the duty of the Court to give effect to the intention of the testator, which was to give John an estate for life in the lands, and at his death to give them to a particular person, namely, John's eldest son or heir-at-law as *persona designata*, who on the other construction would take nothing at all, as his eldest son might or might not be his executor. The result of reading these words as words of limitation would be to defeat the intention of the testator.

The words in the present case are very like those in *Smith* v. *Butcher* (2). There there was a bequest of personal estate in these words:—"The rest of my property which may arise from debts due to me, money in the funds, or otherwise, from the sale of any furniture, books, and from any other source, I desire may be placed in the public funds, and the interest arising therefrom to be equally divided among the children of my brother during their lives, and on the decease of either of them, his or her share of the principal to go to his or her lawful heir or heirs." The argument there was that the children took absolutely by analogy to the rule in *Shelley's Case*, by which a limitation of real estate to a man for life, with remainder to his heirs, gives him an absolute estate in fee; but Jessel, M.R., held that the word "heirs" had its ordinary meaning, and that it was a simple gift of personal estate to the children of A. for their lives, with remainder to their heirs as *personæ designatæ*. The present case is, in my opinion, clearer than *Smith* v. *Butcher* (2). The words here are not "lawful heir or heirs," but "eldest son or heir-at-law." *Smith* v. *Butcher* (2) has been frequently cited with approval in later cases. Mr. O'Brien relied on the case of *Kirkpatrick* v. *King* (3), in the Court of Appeal, reported in the *Irish Law Times Reports* as qualifying *Smith* v. *Butcher* (2). I have had an opportunity since the argument of reading the judgments of the Judges in *Kirkpatrick* v. *King* (3), which, I understand, will appear in the authorized Reports, and I find that *Smith* v. *Butcher* (2) is referred to with approval. The bequest there was of certain houses and lands, which were chattels real, to the testator's nephews William and

(1) 1 Burr. 38.
(2) 10 Ch. D. 117.
(3) 32 I. L. T. R. 41.

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Francis Duke equally, with a direction that if they died without heirs, his nephew Robert and his grandnephew Thomas were to get the lands. There was no life estate given, and nothing to cut down the absolute gift except the gift over. The Court held that the word "heirs" was to be read "heirs of the body," and that the entire interest in the premises vested in William and Francis Duke. It was contended that the word "heirs" could be read as equivalent to "issue," and that, therefore, section 29 of the Wills Act applied, and made the gift over good; but the Court held that it had no power to read "heirs" as equivalent to "issue," and that the Wills Act had no application.

That case has no direct bearing on the present case, where the words are different and a life estate is given; but it recognises the principle on which *Smith* v. *Butcher* (1) was decided, that the word "heirs" must receive a strict construction, and that the rule in *Shelley's Case* does not apply directly to gifts of personal estate.

The rule that words in a will which would create an estate tail in realty create an absolute interest in personalty is a rule which must be applied with great care and with due regard to the context. Hawkins says, at p. 188 of his treatise on Wills:—"It has sometimes been laid down that whatever words in a devise of real estate would create an estate tail confer the absolute interest in personal estate. This, however, is too large a proposition: the word 'issue,' for instance, receives a different construction, according as the subject of the gift is real or personal estate (as will appear subsequently). As regards the technical words 'heirs of the body,' however, the statement is perhaps correct: it is, at all events, the rule that a bequest of personal estate or chattels real to A. and the heirs of his body, or to A. for life, and after his decease to the heirs of his body, vests the property in A. absolutely." This is because it is impossible to give to the words "heirs of his body" any meaning except as words of limitation. The question is really one of interpretation: the testator gave a life estate to John in these lands. I think that there was nothing in point of law to prevent his doing so, and I am of opinion that

(1) 10 Ch. D. 117.

John took only a life estate, and accordingly I hold that the contention of the purchaser is sustained, and that the vendor cannot make title.

Solicitor for the vendor: *W. Frewen.*
Solicitor for the purchaser: *M. J. Crowe.*

W. L.

M'NEILL *v.* RICHARDS.

(1897. No. 41.)

Breach of contract—Sale of growing timber—Measure of damages—Loss of profits.

An action was brought for specific performance of an agreement for the sale of timber growing on the lands of the defendant, and an inquiry as to damages was directed at the hearing instead of a decree for specific performance.

The plaintiff was a timber merchant, and the defendant was aware that the plaintiff bought the timber to dispose of in the ordinary way of his trade. It was shown that similar timber was not procurable in the market, and that the plaintiff would have realised a considerable profit on the sale of the timber:—

Held, that the measure of damages was the difference between the contract price of the timber *plus* the expenses which would be incurred in cutting, removing, and making it marketable, and the amount which the plaintiff would have realised by the sale of the timber.

THIS case came before the Court on a request lodged by the defendant to vary the finding of the Chief Clerk on an inquiry as to damages. The action was brought for specific performance of an agreement for the sale by the defendant to the plaintiff of growing timber. The Master of the Rolls held that there was a binding agreement, and directed an inquiry as to damages instead of making a decree for specific performance. The plaintiff was a timber

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merchant at Ringsend, Dublin. The trees, the subject-matter of the action, were growing on the lands of the defendant at Solsborough, Enniscorthy, in the county of Wexford. Affidavits were filed on behalf of the plaintiff and defendant for the purpose of the inqury before the Chief Clerk. The contract, which was contained in letters, was made in the month of December, 1896, and in January, 1897, the defendant refused to carry out the contract. It was proved by the plaintiff's affidavit, and on his cross-examination before the Master of the Rolls, on the hearing of the present application, that he had bought the timber for re-sale in the ordinary course of trade, that the proper season for cutting timber was in the winter, while the sap was down, that there was no growing timber of the kind to be had in the market, after the defendant's breach of contract. The plaintiff, therefore, estimated his damages as the difference between the contract price and the amount he would have received by resale in the ordinary course of business, after deducting expenses, of cutting down, carrying away, and preparing the timber for sale.

The plaintiff estimated the gross value of the timber at £1413 19*s.* 6*d.*, and the expenditure which would have been necessary therein £1109 10*s.* making the net value lost £304 9*s.* 6*d.* He had spent about £10 10*s.* in the travelling expenses of himself and men in going down to see the timber, &c.

The defendant's affidavit went to show that the value put by the plaintiff on the timber was too high, and that the expenditure thereon would have been much greater, and that his statement that he could not have got other timber of the kind in the market was not correct. The ruling of the Chief Clerk stated that he did not understand on what basis to estimate the damage; that the plaintiff alleged that the capital outlay on the contract would have been £1100, and the defendant made it to be £1400. The plaintiff's solicitor stated that the fair rate of profit on capital in the trade was 20 per cent.; he therefore allowed £280 damages, either party to be at liberty to lodge a request within ten days.

The defendant accordingly brought the matter before the Court as already stated. The plaintiff and other persons who had made affidavits were cross-examined in Court. The other facts and the effect of the evidence is stated in the judgment.

Matheson, Q.C., Cherry, Q.C., and *Corvan*, for the defendant:—

The claim is an extravagant one: and the Chief Clerk acted on a wrong principle. The measure of damages is the difference between the contract price and the amount which the plaintiff would have had to pay for similar timber in the market, when the contract was broken. The plaintiff could have got similar growing timber in the market, or if not, he could have got cut timber. Damages cannot be given for loss of profits.

The Right Hon. The Mac Dermot, Q.C. and *A. F. Blood*, for the plaintiff:—

The conclusion arrived at by the Chief Clerk is right, though the principle he has adopted may be wrong. The agreement was for the purchase of an article which could not easily be got in the market. The plaintiff is entitled to recover the net profit he would have made on the sale of the timber. The cases as to damage for non-delivery of goods apply. The plaintiff is willing to leave the amount of the damages to be settled by the Court.

The following authorities were cited: *Fletcher* v. *Tayleur* (1); *Hadley* v. *Baxendale* (2); *Williams* v. *Reynolds* (3); *Cory* v. *Thames Iron Works Company* (4); *Re Trent and Humber Company* (5); *France* v. *Gaudet* (6); *Thol* v. *Henderson* (7); *Hamilton* v. *M'Gill* (8); *The Argentino* (9).

THE MASTER OF THE ROLLS:—

I have not made up the figures, but as regards the principle upon which the damages should be ascertained it is better that I should state my opinion, rather than bring the parties back on a subsequent occasion. I should incline in favour of moderation in a case of this sort, in which neither of the parties is deliberately to blame. The question of the principle on which I should assess the damages is an important one. Mr. M'Neill the plaintiff is

(1) 17 C. B. 21.
(2) 9 Exch. 341.
(3) 6 B. & S. 495.
(4) L. R. 3 Q. B. 181.
(5) L. R. 6 Eq. 396.
(6) L. R. 6 Q. B. 199.
(7) 8 Q. B. D. 457.
(8) 12 L. R. Ir. 186.
(9) 14 A. C. 519.

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engaged in the timber trade, and has saw mills at Ringsend. Of this fact the defendant General Richards was, I find as a fact, aware from the commencement of the transaction. In November, 1896, the defendant entered into negotiations with the plaintiff for the sale of certain timber, having express notice that the plaintiff was in the timber trade and was desirous of buying timber for the purposes of profit in the way of his trade. The first offer was £200, which was in December, 1896, increased to £225. I need not read again the letter accepting the plaintiff's offer, which has been already read. The trees in question were growing on the defendant's property at Solsborough, near Enniscorthy, in the county Wexford. The trees had to be cut down, and carted to the railway station at Enniscorthy, which was some distance off, and placed on trucks there, and brought by rail either to Dublin, and thence to the plaintiff's premises at Ringsend, or elsewhere. It is a common practice for the plantations on an estate to be sold by the proprietor. Very often they are advertised for sale, and timber merchants go down and see the plantations.

The plaintiff's offer was accepted, and though the defendant objected to the terms, he was, as I have already decided, bound by the arrangement made by Gilchrist his agent. In the result the defendant declined to carry out the contract, and the plaintiff brought an action for specific performance. The action came on for hearing before me, and I declined to give a decree for specific performance. Neither of the parties desired such a decree, but preferred that damages for the breach of contract should be assessed, as difficulties and unpleasantness would have arisen in the carrying out of the contract, and in the cutting down and removal of the trees by the plaintiff on the defendant's lands. The plaintiff has brought in an account before the Chief Clerk, to whom the assessment of damages was referred. In his affidavit the plaintiff states that the timber which he purchased consisted of 2855 trees: of these 1459 were oak trees, which, he says, when cut and removed, would have been value to him for £426 10*s.* gross; 758 ash trees, value to him for £410 gross, and the remaining trees consisting of beech, sycamore, spruce, Scotch fir, etc., which he says were value to him for £577 9*s.* 6*d.*, making the

total gross value of the trees bought, £1413 19*s.* 6*d.* This sum of course could not have been realised by a sale of the trees on the road outside the gates of Solsborough, but by removing and carting away the timber, and taking it to market: some of it, as he says, by rail to Dublin, to his saw mills at Ringsend; the remainder to be shipped from Wexford to Garston and other places. I am satisfied that the defendant did not know precisely where the timber was going, but he knew that it was to be used by the plaintiff in the way of his trade. The plaintiff therefore estimates the loss which he sustained at the sum of £1413 19*s.* 6*d.*, less by the purchase money to be paid to the defendant, namely £225, and expenses, viz. the cost of felling and crosscutting, carting, carriage, delivery, shipping freights, and charges, port and harbour dues, superintendence, and proper disbursements, which he estimated at £1109 10*s.* Deducting this from the £1413 19*s.* 6*d.*, the balance was £304 9*s.* 6*d.*, which he calls the net loss. The details showing how these sums are made up are given in the affidavit. The plaintiff had not any sub-contracts for the sale of the timber, or, if he had, they are not before me. There is no claim put forward as special damage for loss of profit on a particular re-sale. The plaintiff said he would have made this profit in the ordinary course of his trade, and using the timber just as any other merchant would have used it in his business. I am entitled to take it in that way. The Chief Clerk assessed the damages at £280, being 20 per cent. estimated profit on an outlay of capital amounting to £1400. The matter comes before me on a request of the defendant, who contends that the amount of damages so assessed by the Chief Clerk is excessive. Mr. Cherry, who opened the application on behalf of the defendant, contended that the only damages recoverable by the plaintiff was a sum of £10 10*s.* expenses incurred by him in going down to Solsborough to see the timber before the purchase. In the view I take of the case I think he clearly is not entitled to that, for it was an expense which he would have incurred in any event, even if he had not bought the timber. Mr. Cherry asked me to decide that there was a rule of law that nothing could be recovered for loss of profits: that means that for the breach of such a contract as this only nominal damages can be recovered.

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There is no such rule of law, and no authority for such a contention. The contract was a peculiar one, for the sale of growing timber. I do not say that there was no market for the sale of growing timber, but it was a limited aud exceptional market, and depended on the district and the time of year. There was no possibility of a market for re-sale in the neighbourhood of the defendant's residence. This business of buying growing timber is a peculiar business; the person engaged in it has to find out where there is growing timber for sale suitable for his purpose, which is not an easy matter. The time of year for buying it is important, as it cannot be cut in the spring when the sap is up or rising. The plaintiff was cross-examined before me on his affidavit; he did not press anything unfairly against the defendant; he stated that the cutting of timber could not go on after 1st April. In the present case the negotiations between the parties were not at an end till about January 12th. What was he to do after that date? It was said on behalf of the defendant that when the defendant had refused to carry out his contract the plaintiff ought to have gone into the market and bought other timber. He would have had to look about for a person who had timber of a similar character to the defendant's for sale, and for this the time was limited by reason of the season of the year. I do not lay stress on the difficulty of getting exactly the same kind and quantity of timber at the same price. If, acting reasonably, he could have replaced the defendant's contract by one of a similar nature, though at a higher price the difference in price would have been the measure of damages. He says that he knew of no one who had similar timber for sale, and could not find any. It was by counsel suggested in cross-examination that he could have got it at Mr. Bruen's and at Drumsna. It is not shown that there was any foundation whatever for the suggestion; and as a fact he got none there. He might, possibly, have got it elsewhere, but he was doing his best, and did not succeed. I have no doubt that he believes that he lost the full sum which he claims as damages. But it is said that he can only get nominal damages, and that he cannot go into the question of loss of profits, as that is too remote. A man may make a good bargain, and yet if the other party breaks his contract it is said that he cannot recover anything

for loss of profit. Damages claimed by a plaintiff in an action for breach of contract may be too remote, as in the leading case of *Hadley* v. *Baxendale* (1), where the action was brought by the owners of a steam-mill against a carrier for breach of contract to deliver a shaft, and the defendant delayed its delivery. The plaintiffs claimed as specific damages the loss of profits while the mill was idle, but this was held not to be in the contemplation of the parties, the defendant having no notice that a loss of profits would result from delay on his part, and that not being within the contemplation of either party. It appears, however, from the rule laid down in that case that a party will be held responsible for the ordinary consequences of his breach of contract. Here the defendant knew very well that the plaintiff was buying the timber not for purpose of amusement, but to use in the way of his trade as a timber merchant. The measure of damages, in my opinion, is the difference between the price paid for the timber according to the contract and the price which the defendant would have realised in the ordinary way of his trade. Several cases were cited, but I need only refer to two. It has been laid down that if the plaintiff could by going into the market have bought other goods of the same kind, the price at which they would have been bought would be the true measure of damages: *France* v. *Gaudet* (2). In that case the article purchased was champagne of a quality that could not be procured in the market. The plaintiff had resold it at a considerably increased price, and claimed as damages the difference between the contract price and the price which he had resold it. It was held that the plaintiff was entitled to this difference as damages, but not, however, as loss of profits on the re-sale, but because the price obtained on the re-sale was taken as the best test of the market value of the champagne at the time. *Thol* v. *Henderson* (3) was also relied on. That was the case of a breach of contract for delivery of a peculiar article, shellac, which could not be procured in the market. It had been resold, but the defendant had no notice of the contract for re-sale. Grove, J., there says:—"The question is, on what principle damages are to be assessed in this case, and whether the plaintiff is entitled to damages for loss of profit on a sub-contract which he had made for the sale of the goods. This sub-contract

(1) 9 Exch. 341. (2) L. R. 6 Q. B. 201. (3) 8 Q. B. D. 457.

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was not known to the seller at the time of the sale, but it was known that the plaintiff had purchased the goods for the purpose of re-sale. On these facts I think that the damages ought not to be assessed so as to include the loss of profit on the sub-sale." That is not contradictory to *France* v. *Gaudet* (1); because in *Thol* v. *Henderson* (2) the defendants had paid into Court the difference between the contract price and the market value of shellac of similar quality at the date of the breach of contract, and the plaintiff there was not turned round, as is attempted here, and told by the defendant that he was only entitled to nominal damages. The only question there was, should the particular contract of re-sale be taken into account in assessing the damages, and the Court held that it should not. No such question of a particular re-sale arises in the present case. I am satisfied that the proper way of assessing the damages here is to take the contract price of the timber, the expenses which would be necessarily incurred in cutting and removing it, and making it marketable, add them together, and on the other side to take the sums which the timber would have sold for, and to give the plaintiff the difference. This would not be a fancy profit, but the fair market price. The Chief Clerk assessed the damages in a different way; I am far from saying that the principle he adopted was a bad one; he gave a per centage on the outlay of the 20 per cent., making £280. This strikes the defendant and his counsel as an extraordinary figure to arrive at, for they say it would have been better for the defendant to have made to the plaintiff a present of the timber and a sum of money in addition. I think, however, that the principle I have stated is the proper one to adopt. If I give to the plaintiff less than the sum he claims in his affidavit it will be because I consider his figures to be too large, and besides he has not risked any capital in the event which has happened; and even if his figures are correct it does not follow that he ought to get the whole of the sum he claims. Every contract of the sort is liable to contingencies. I shall look into the figures, and inform the Chief Clerk of the amount which I arrive at.

Solicitors for the plaintiff: *Meredith & Son.*

Solicitor for the defendant: *T. B. Moffat.* W. L.

The Master of the Rolls assessed the damages at £120.

(1) L. R. 6 Q. B. 201. (2) 8 Q. B. D. 457.

HILL *v.* HAIRE.

(1898. No. 766.)

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Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 123—*Compulsory purchase—Limit of time for—"Special Act"—Meaning of—Military Lands Act*, 1892 (55 & 56 *Vict. c.* 43), *s.* 2 (2)—*Military Lands Provisional Orders Confirmation Act*, 1895 (58 *Vict. c. xxv, loc. & pers.*)—*Statutes—Literal Construction of.*

The Lands Clauses Consolidation Act, 1845, sect. 123, limits the time for compulsory purchase of lands, if no period is prescribed, to three years after the passing of "the Special Act." The Military Lands Act, 1892, which was passed on June 27th, 1892, to provide for the acquisition of lands for military purposes, incorporates the Lands Clauses Act, 1845, and enacts that, "in the construction of this Act and of the incorporated Acts this Act shall be deemed the Special Act." It also enacts that the provisions of the incorporated Acts with respect to compulsory purchase shall not be put in force until a Provisional Order has been made and sanctioned by Act of Parliament.

In 1895 an Act was passed confirming a Provisional Order authorising the Secretary of State for War to take certain lands in the neighbourhood of Londonderry for military purposes, and, in February, 1898, a notice to treat was served, and the other necessary steps were taken to have the amount of compensation to be paid for the lands ascertained by arbitration, pursuant to the said Act. The statutory notices were served on the occupier, and on the owner, who was tenant for life.

In June, 1898, an action was brought against the arbitrator appointed by the Secretary of State for War and the tenant for life by the owners of the reversion in fee to restrain the arbitration proceedings on the ground of want of jurisdiction, the compulsory powers having, as they alleged, expired at the end of three years from the passing of the Military Lands Act, 1892, which they contended was the "Special Act":—

Held, that a literal construction could not be given to the words of the Military Lands Act, 1892, deeming it to be the "Special Act," and that the "Special Act" within the meaning of the Lands Clauses Act, 1845, sect. 123, was the Military Lands Act, 1892, together with the Act of 1895 confirming the Provisional Order made pursuant to the Act of 1892.

INJUNCTION MOTION.

This was an application for an interlocutory injunction to

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restrain Robert Haire, the arbitrator appointed by the Secretary of State for War, and Lady Elizabeth Sophia Hill, the tenant for life of the lands of Clooney, otherwise known as St. Columb's, in the neighbourhood of Londonderry, from proceeding with an arbitration to assess the amount of compensation to be paid to the owners and occupiers of the lands for the compulsory purchase thereof pursuant to the Military Lands Act, 1892. The plaintiffs were Sir Henry Blyth Hill, John Baptiste Potter, and James Aikin Puxley, who were entitled to the reversion in fee of the lands expectant on the determination of the life estate of the defendant Lady Hill.

By consent the motion was treated as the trial of the action.

The facts of the case and the arguments appear from the judgment.

The Right Hon. C. H. Hemphill, Q.C., T. L. O'Shaughnessy, Q.C., and *William Moore,* for the plaintiffs.

Ronan, Q.C., Campbell, Q.C., and *J. F. V. Fitz Gerald,* for the Secretary of State for War.

W. M. Jellett, for Lady Hill.

June 25.

THE MASTER OF THE ROLLS :—

This a motion by the plaintiffs, Sir Henry Blyth Hill, John Baptiste Potter, and James Aikin Puxley, for an injunction to restrain the defendant, Lady Hill, from appointing an arbitrator under the provisions of the Lands Clauses Acts, and the Military Lands Act, 1892, to assess the amount of compensation payable by the Secretary of State for War in respect of portion of the lands of Clooney, otherwise known as St. Columb's, in the county of Londonderry, which portion the said Secretary of State wrongfully claims to be entitled to take possession of, and for an order restraining the defendant Robert Haire from acting as arbitrator, either conjointly with an arbitrator to be appointed by the said Dowager Lady Hill, or solely in the event of no arbitrator being appointed by the said Lady Hill, and from proceeding with any arbitration

under the provisions of the said Lands Clauses Acts, or Military Lands Act, 1892, and that such order do remain in force pending the hearing of this action, or until further order, the plaintiffs undertaking to abide such order as to damages to be sustained by reason of such interlocutory injunction as the Court may think fit, and that the plaintiffs' costs of such application may be their costs in this action.

The proceeding sought to be restrained has been instituted under and pursuant to the statute 58 Vict. c. xxv., local and personal, confirming amongst others the Londonderry Ebrington Barracks Provisional Order, relating to the lands of Clooney, situate in the barony of Terkeeran, parish of Clondermot, and county of Londonderry. This statute is called the Military Lands Provisional Orders Confirmation Act, 1895. The defendant Haire is the arbitrator nominated by the Secretary of State for War for the purpose of assessing compensation for the lands in question which are required for military purposes. Lady Hill, the other defendant, is tenant for life of the lands, and the plaintiff, Sir Henry Blyth Hill, is entitled in remainder. There is no question about the title, nor (for present purposes), about anything else except the legality of the proceedings contemplated by the War Office for acquiring the lands in question. The facts of the case so far as they are material, are stated in the affidavit of Mr. Henry Maxwell Dalston, of the firm of Dalston, Son & Elliman, for many years the family solicitors of the plaintiffs. A great deal of the affidavit is taken up with the title, which is not in dispute; the first paragraph I need refer to is paragraph 8. Mr. Dalston there says:—"In October, 1895, Mr. Harvey, who is resident agent for the said Dowager Lady Hill, applied to the trustees of the said settlement of 18th June, 1890" (that is to the plaintiffs Potter and Puxley), "for particulars thereof, as the Secretary of State for War contemplated taking 12 acres 1 rood and 38 perches or thereabouts of the St. Columb's Estate, under compulsory powers for the purpose of extending the Ebrington Barracks, and Mr. Harvey was supplied with such particulars." Paragraph 9:—"Nothing more was heard of the matter by Sir Henry Blyth Hill, or the trustees of his settlement, until the month of September, 1896, when they were apprised that a sole

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arbitrator (Mr. Murphy) appointed by the Government had issued his draft award, and had appointed the 16th October, 1896, at Londonderry, for hearing objections thereto. Such draft award showed that the land, being acquired by the Government, amounted to 12 acres 1 rood and 38 perches. It also showed that Mr. Murphy intended to award in respect thereof the following sums:—

"To the Dowager Lady Hill, the value of the freeholder's interest:—£4527 10*s*. To Mr. Cooke as the value of the lessee's interest £1474, making together £6001 10*s*., and that the rent payable by the lessee should be reduced by £24 19*s*. 6*d*. per annum."

After stating his objections to the lease and to the amount awarded, he says in paragraph 15:—"Sir Henry Blyth Hill and his trustees were advised that the jurisdiction of the arbitrator should be objected to on the ground that the Government had no power to have the award of a sole arbitrator. Sir Henry Blyth Hill and his trustees were for the protection of the inheritance accordingly represented by counsel at Londonderry at the sitting of the arbitrator on the 27th October, 1896, for hearing objections to his award, and objections were taken to the arbitrator's jurisdiction, and such objections were allowed to be good by the counsel appearing for the Crown." This was by reason of the decision of the Queen's Bench Division and Court of Appeal, in *Regina* (*Moore*) v. *Abbott* (1).

The affidavit then proceeds:—"By power of attorney, dated the 1st June, 1897, William G. Towers was appointed attorney for the Secretary of State for War. By notice of 14th February, 1898, the said William G. Towers as such attorney as aforesaid served a notice entitled in the Military Lands Acts of 1892, Military Lands Provisional Order Confirmation Act, 1895, and the Lands Clauses Acts, on the said Dowager Lady Hill and others, in which, after reciting the Military Lands Confirmation Act of 1895, the said Secretary of State for War gave notice that he required to purchase and take the said lands for the purpose of enlarging the Ebrington Barracks in the city of Londonderry,

(1) [1897] 2 Ir. R. 362.

and by subsequent notice of the 18th March, 1898, the said William G. Towers as such attorney in exercise of the powers conferred by the 20th section of the Military Lands Act, 1892, required that the compensation for the said land should be assessed by arbitration, and not by a jury pursuant to the provisions of the Lands Clauses Acts, and by further notice of the 19th day of March, 1898, the said William G. Towers, also as such attorney, gave notice that by writing, dated the 18th day of March, 1898, he had appointed Robert Haire, the above-named defendant, to determine the amount of purchase-money and compensation to be paid by the Secretary of State for the said lands." Paragraph 19 is as follows:—"I have been advised and believe that the present proceedings of the said William G. Towers are *ultra vires*, for the reasons stated in the notice of the 20th day of May, 1898, served by my firm on Sir Patrick Coll, the Chief Crown Solicitor acting in the said proceedings on behalf of Her Majesty's Principal Secretary of State for the War Department, and I believe that there is no power in the said William G. Towers to take the said lands compulsorily in the present proceedings."

The point is a very narrow one and arises thus:—The Military Lands Act of 1892, passed to enable a Secretary of State, or other competent authority, to purchase land for military purposes, incorporates the Lands Clauses Act of 1845. Section 1 deals with powers to purchase lands. Sub-section 1 provides that "a Secretary of State may purchase land in the United Kingdom under this Act, for the military purposes of any portion of Her Majesty's military forces." Sub-section 2 enables a volunteer corps, with the consent of the Secretary of State, to purchase lands for military purposes. Sub-section 3 enables the council of a county or borough at the request of one or more volunteer corps to purchase and hold lands on behalf of the volunteer corps for military purposes.

Thus three distinct authorities are entitled to purchase lands for the purposes of the Act.

The machinery is prescribed by section 2, and it is on the words of part of this section that the question arises. The section commences thus: "For the purpose of the purchase of land under this Act, the Lands Clauses Acts shall be incorporated with this Act, with the exceptions and additions and subject to the provi-

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sions following (that is to say), (1) There shall not be incorporated with this Act sections sixteen or seventeen of the Lands Clauses Consolidation Act, 1845, or the provisions of that Act with respect to affording access to the Special Act." Sub-sect. 2 and this is the important provision, runs thus:—"In the construction of this Act and the incorporated Acts this Act shall be deemed to be *the Special Act*, and the Secretary of State, volunteer corps, or council of a county or a borough, as the case may be (in this section referred as 'the purchaser') shall be deemed to be the promoters of the undertaking."

By section 123 of the Lands Clauses Acts, 1845, "the powers of the promoters of the undertaking for the compulsory purchase or taking of lands for the purposes of the Special Act shall not be exercised after the expiration of the prescribed period, and if no period be prescribed not after the expiration of three years from the passing of the Special Act." But the Military Lands Act was passed on the 27th June, 1892, and the contention is that its powers expired on the 27th June, 1895. In fact Mr. Hemphill's argument was in the form of a syllogism. No compulsory powers (except where some other time is prescribed) shall be exercised after three years from the passing of the Special Act. The compulsory powers in question are conferred by the Military Lands Act, which is the Special Act. Therefore they cannot be exercised after three years from its passing. The question turns upon the minor premise. Is the Military Lands Act by itself, for this purpose, the Special Act? Mr. Hemphill's answer is that the Act itself says so: at least it says that it shall be "deemed" to be the Special Act. If this be correct, then the argument is complete, and the Act itself has long since expired.

Can this be the meaning of the Legislature? The statute repeals seven Acts or parts of Acts, which are all permanent; can it have been intended to substitute a law to last only three years, and never in fact renewed? When a statute is intended to be only temporary it always says so in terms, and the Act drops out of the revised edition of the statutes.

Again, the statute itself is general; applicable to any lands in the United Kingdom to which its provisions may be made to apply by Provisional Order confirmed by Act of Parliament; but itself

dealing with no lands in particular. It furnishes certain machinery applicable to any lands, but applied to none. How can it then be a *special* Act? The word "special" implies particularity, and is used in contradistinction to general, and I find in the definition clause of the Lands Clauses Act, 1845, "the expression 'the Special Act' used in this Act shall be construed to mean any Act which shall be hereafter passed which shall authorise the taking of lands for the undertaking to which the same relates." This cannot apply to the Military Lands Act, which does not of itself authorise the taking of any land whatever. Again the lands to be taken are lands for the undertaking. "Undertaking" is defined as "the undertaking of whatever nature which shall by the Special Act be authorised to be executed." By the Military Lands Act, 1892, lands may be acquired, (1) by the Secretary of State, (2) by a volunteer corps, or (3) by the council of a borough or county. All these cannot take the same lands. Accordingly one of these bodies, according to the circumstances of each case, is to be deemed to be the promoter of the undertaking, s. 2 (2). As there then is no undertaking till the lands are defined, and no promoter till the lands are wanted by the Secretary of State, or by a volunteer corps, or by a municipal or county council, to be determined by the Special Act, and as none of these is or can be defined by the Act of 1892 alone, it follows that the Act of 1892 cannot by itself be the Special Act referred to in s. 123 of the Lands Clauses Act. But the Provisional Order is made under the Act of 1892, and when confirmed by Act of Parliament comprises by reference to that Act every particular requisite to a valid "Special Act." In this case the Provisional Order as confirmed gives the Secretary of State power to purchase the lands in question for the specified purpose. There is therefore a promoter, an undertaking, and a special Act. The plaintiff however says, all that is very well, but you have the words of the statute. It is the Act of 1892 which shall be deemed to be the Special Act, and whether there has been a blunder or not is immaterial, the language of the Act must prevail. I have, however, shown that the literal construction of the language is simply impossible. The true construction must be that the statute when applied to a particular undertaking (and so made special) shall, together with the statute confirming the

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Provisional Order, be deemed to be the Special Act, that is, the confirming statute incorporating the Act of 1892 becomes with and by virtue of the powers of that Act the Special Act.

This no doubt fills up an ellipsis; but this or similar language, supplying something not expressed but necessarily intended, is to be gathered from the scope and framework of the Act, and is needed to give any meaning to the language used.

The rules as to the construction of statutes are stated by Sir George Jessel, in *Ex parte Wilton* (1). He says at page 750:— "Before considering the exact words of the section, I should like to say a word or two as to the rules which are binding on all Courts in respect to the construction of statutes as well as of all other instruments. Whatever may have been the case in times past, in modern times these rules have become perfectly well settled. They have become much more limited as regards the power of the Courts, and at the same time so well recognised as to be binding on this Court and all other Courts. To show what these rules are, I will cite from the last case on the subject in the House of Lords, *Caledonian Railway Company* v. *North British Railway Company* (2), which was decided in February, 1881, consequently it is not only the last decision, but a very recent case. It was an appeal from the Court of Session in Scotland, but it is an authority in England, the rules on this subject being the same in Scotland as in England. The appellant there contended that the literal construction ought to be given to a section of an Act of Parliament, though it appeared that that construction would defeat the object of the Act as shown by the preamble. That contention, however, did not prevail. And Lord Selborne laid down the rule of construction in these words:— 'The more literal construction ought not to prevail if (as the Court below has thought) it is opposed to the intentions of the Legislature, as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated'; and in the same case Lord Blackburn quoted with approval that which Lord Wensleydale called the golden rule for construing all written

(1) 17 Ch. D. 746. (2) 6 A. C. 114.

instruments, and which stated thus in *Grey* v. *Pearson* (1):—'I have long and deeply been impressed with the wisdom of the rule now, I believe, and usually adopted, at least in the Courts of Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.'"

And Lush, L. J., says at p. 757:—"I have felt great difficulty in coming to a conclusion as to the construction of section 23. I have thought of it a great deal, and I have ultimately arrived at the same conclusion as my learned brethren—that we must qualify the generality of the words in order to carry out the object. It seems to me impossible to construe the section literally without defeating its object and creating a manifest absurdity."

During the argument I asked if any Provisional Orders had been confirmed by statute since the 27th June, 1895. I was shown one, 59 & 60 Vict. c. xxii. (loc. and pers.), The Military Lands Provisional Orders Confirmation Act, 1896, passed on the 20th July, 1896, purporting to be made under and pursuant to the Act of 1892. This is a clear legislative declaration that the Act of 1892 did not expire three years after it was passed, but was in full force in 1896. There may have been other such Acts. One, however, is enough, and shows on the authority of Parliament that the plaintiff's contention is unfounded. The plaintiff says that Acts confirming Provisional Orders are seldom discussed in Parliament, and ought therefore to have small respect shown to them. It may be true that, as a rule, they do pass unopposed, but they must have the assent of the Queen, Lords, and Commons, and the Courts have no right to consider, and indeed no means of knowing, whether a particular statute has or has not been debated at length. Nor can it be assumed that the statutes which have been debated most copiously are the most free from errors of expression or of substance, for in

(1) 6 H. L. Cas. 61, 106.

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them there are more usually amendments, not contrived by the framers of the statutes.

I am clearly of opinion that the present motion must be refused, and with costs, the parties having agreed that it is to be treated as the trial of the action.

Solicitors for the plaintiffs: *Thomas Geoghegan & Sons.*
Solicitor for the defendant Haire: *Sir P. Coll.*
Solicitors for the defendant Hill: *Barrington & Son.* W. L.

Ross, J. 1898. Nov. 21, 28.

IN THE MATTER OF THE ESTATE OF CLAUD WILLIAM LAWRENCE MARSHALL AND ELIZABETH GLADSTONE, OWNERS AND PETITIONERS; RICHARD FRY'S OBJECTION.

Settlement—Construction—Expired term of years to raise portions—Intention to charge.

By a post-nuptial settlement, dated in 1786, executed in pursuance of marriage articles dated in 1749, a term of years was created, the trusts of which were to raise a sum as portions for younger children. The term expired in 1892, at which time one of the portions had not been raised. The Judge, being of opinion that there was in the deeds no expressed intention to charge the portions independently of the term, nor any ambiguous expression from which such intention could be inferred:—

Held, that the term having come to an end, the portion was not now raisable.

THIS case came on by way of objection on behalf of Richard Fry to the final Schedule of Incumbrances. By marriage articles dated the 18th of October, 1749, entered into prior to the marriage of Lawrence Marshall and Elizabeth Jacob, for the purpose of making a provision for the issue of the intended marriage, Lawrence Marshall covenanted that so soon as he should be seised of the legal estate in the lands for sale in this matter, he would well and sufficiently convey and settle the same to and for and subject and under the several uses and trusts thereinafter mentioned, that is to say from and after the death of Lawrence Marshall to the use of Robert Marshall and Francis Greene

Despard for a term of 100 years "upon trust, whether by, with, or out of the rents, issues, and profits of the said premises, or by demise, mortgage or sale of all or any, or of a sufficient part of the said lands and premises, for any part of the said term, or by all or any of the said ways and means or otherwise, as to him or them in his or their discretion should seem meet, to levy and raise . . . £1200" for younger children of the marriage.

By an indenture of post-nuptial settlement dated the 29th of April, 1786, and made between Lawrence Marshall and Elizabeth Marshall, otherwise Jacob, of the first part, Lawrence Marshall the younger, eldest son of the said Lawrence Marshall and Elizabeth Marshall of the second part, Samuel Jacob of the third part, and William Despard of the fourth part, reciting the agreement of the 18th of October, 1749, and that the then intended marriage had taken place, and that Lawrence Marshall the younger had attained the age of 21 years, and that there were several younger children of the marriage, and further reciting that Lawrence Marshall the elder then stood seised of the legal estate for a term of three years renewable for ever, of and in the premises, and that he and Lawrence Marshall, junior, had agreed that the same should be settled as therein, subject, however, to the said sum of £1200 for the younger children, which it was intended thereby "effectually" to charge and secure pursuant to the said articles; it was witnessed that for the consideration in the said articles mentioned and in order to secure a sum for the younger children of the said marriage, pursuant to the said articles, the premises were settled on Lawrence Marshall for life, and after his death, subject as therein, to the use of William Despard, his executors, administrators, and assigns, for and during the term of 100 years, and subject thereto to the use of William Marshall the younger, his heirs and assigns, for all the continuance of the aforesaid term and estate therein; and the trusts of the term were "that he the said William Despard, his executors, administrators, and assigns, shall and do after the commencement of the said term . . . out of the rents, issues and profits of the premises, or by sale or mortgage of such part thereof as shall be sufficient . . . raise and levy or borrow and take up at interest the sum of one thousand two hundred pounds of lawful money of

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Great Britain for the portion or portions of the younger child or children . . . of the said Lawrence Marshall the elder," and Elizabeth Marshall in such shares as Lawrence Marshall the elder should by deed or will appoint, and in default of appointment equally, and after the said £1200 was levied and paid then the said term of 100 years should cease and determine.

There were four younger children of the marriage, who, in default of appointment, took this charge in equal shares. The shares of three had been paid off many years ago. The remaining one-fourth of the charge (£276 18*s.* 6*d.* sterling)—was legally vested in Richard Fry, the applicant. It was admitted that Lawrence Marshall, the elder, died in 1792.

T. Pakenham Law, Q.C., for the objector :—

Although the term of one hundred years has expired, we rely on the *dictum* of Turner, L. J., in *Re Strand Music Hall Company* (1) :—"Where this Court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it." This intention can be seen from the marriage articles of 1749. The money is thereby made an immediate charge on all the estate of Lawrence Marshall, though the mode it was carried out by was by creating a term of one hundred years; and power is given to raise the charge by demise, mortgage, or sale or otherwise. The post-nuptial settlement of 1786, executed by Lawrence Marshall and his son, who had power to charge that estate, settles the estate subject to the charge of £1200, which it was expressed that it was intended thereby effectually to charge, and the consideration is stated to be, in order to secure a sum of £1200 for younger children. The effect of these deeds is to create an absolute and complete charge in equity on the estate: Mitford on Pleading, 4th ed., 116; *Mandeville* v. *Roe* (2); *Burrowes* v. *Gore* (3); *Greene* v. *Stoney* (4); *In re Nash* (5); *Rorke* v. *Sherlock* (6); *Ross* v. *Army and Navy Hotel*

(1) 3 De G. J. & S. 147, at p. 158.
(2) 7 Ir. Eq. R. 253.
(3) 6 H. L. Cas. 907, at p. 953.
(4) 13 Ir. Eq. R. 301, at p. 312.
(5) 5 Ir. Ch. R. 384.
(6) Ir. R. 11 Eq. 510.

Company (1); *Queensland Land and Coal Company*; *Davis* v. *Martin* (2). It is not necessary to show an intention to charge, independently of the means of raising the charge. The intention to charge is shown here in the deed, and that in a wider way than by the mere mode of charging. The articles of 1749 expressly state part of the consideration to be the making of a provision for the issue of the marriage, and contain a covenant by Lawrence Marshall to settle the lands upon the uses and trusts thereinafter mentioned. The words "or otherwise" mean in other manner than through the instrumentality of the term.

Price, Q.C., and *G. Y. Dixon*, for the owner:—

There is no intention to charge independently of the term. In the articles of 1749 there is no recital of any such intention, and the words "or otherwise" mean by doing something with the term. As to the deed of 1786, there is no intention therein of doing anything more by way of charge than was done in the articles of 1749. The word "effectually" means merely the turning of the equitable estate into a legal estate, and the later deed purports to be merely "pursuant to the articles." Here there is not shown any intention to charge, nor is there any machinery provided for raising the portions except by means of the term. The right and the remedy are given together, and it is the fault of the claimant if he allows the term to run out. In *Mandeville* v. *Roe* (3) an intention to charge was found independently of the machinery for raising the charge. As to *Burrowes* v. *Gore* (4) the Vice-Chancellor expressly states in *Rorke* v. *Sherlock* (5) that it could not be considered satisfactory in consequence of the difference between the Judges. In *In re Nash* (6), Monahan, C. J., points out that the creation of the term was only a further mode of raising the charge. Here the creation of the term was the only mode of raising the charge. As to *Greene* v. *Stoney* (7) it was on expressions in the deed, showing the intention of the settlor to charge the debts, &c., that the judgment was given. *The Strand Music Hall Company* (8) is the same. You cannot, from an expression of an

(1) 34 Ch. D. 43.
(2) [1894] 3 Ch. 181.
(3) 7 Ir. Eq. R. 253.
(4) 6 H. L. Cas. 907.
(5) Ir. R. 11 Eq. 510, 517.
(6) 5 Ir. Ch. R. 396.
(7) 13 Ir. Eq. R. 301.
(8) 3 DeG. J. & S. 147.

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intention to do a thing in one way, infer an intention to do it in some other way. Here there is no reference to anything else than the term; and it was only the interest in the term which could be mortgaged or sold.

Nov. 28.

Ross, J.:—

On this objection filed on behalf of Richard Fry, I am asked to remove from the final schedule of incumbrances a statement that the owners do not admit the charge, on the ground that a term of 100 years created by an indenture of 29th April, 1786, has expired.

This last mentioned indenture is a post-nuptial settlement, executed by Lawrence Marshall and Elizabeth Marshall his wife, William Despard, and other parties. This settlement was executed in pursuance of marriage articles entered into on the 18th October, 1749. By the settlement, a term of 100 years, to run from the death of Lawrence Marshall, was vested in William Despard upon trust to raise a sum of £1200, Irish currency, for the younger children of the marriage, divisible equally in case of no appointment. There was no appointment. There were four younger children; each of them was entitled to £300 Irish, or £276 18*s.* 6*d.*, present currency. The portions of three of these children have been paid off many years ago; one of the younger children, Oliver Marshall, never received his share. This share is now vested in Mr. Fry, the objector.

It is admitted that the trust term out of which the £1200 was to be raised has expired, and the owners submit that the share which has not been raised cannot be raised *now*, and should not appear as a charge on the schedule. On the other hand it is contended, in the words of Lord Justice Turner, that where the Court is satisfied that it was intended to create a charge, and the parties had the power to create it, the Court will give it effect, notwithstanding any mistake which may have occurred in the attempt to effect it: *Re Strand Music Hall Company* (1), or, as, it is put by Lord Redesdale (Mitford on Pleading, 4th ed., p. 115), "where parties by contract have given a right, but have not provided a sufficient remedy, Courts of Equity have also

(1) 3 De G. J. & S. 147, at p. 158.

interfered." He gives as examples cases where parties meaning to create a perfect title have used an imperfect instrument. Courts of Equity, he states, have in such cases considered the imperfect instrument as evidence of a contract for making a perfect instrument, and have remedied the defect.

In considering what was the intention of the parties, it is not open to me to make vague surmises as to their probable views in providing for the younger children of the marriage. I am strictly confined to a consideration of the words used in the marriage articles, and in the post-nuptial settlement. If from these I can infer an intention to charge these portions on the fee independently of the term, I am bound to give effect to the intention. If, on the other hand, the words show that the charge is inseparable from the term, and is dependent upon and derives its validity from the term, I must hold that it disappears with the expiration of the term. I can find nothing in the deed of 18th October, 1749, to warrant me in the inference that anything more is intended than is expressly stated. Mr. Law, for the objector, relies on the following clause:—"on trust, &c., out of the rents and profits of the said lands and premises, or by demise, mortgage, or sale of all or any, or a sufficient part of the said lands and premises for any part of the said term, or by all or any of the said ways or means, *or otherwise*, &c., to levy, &c." It is contended that the words "or otherwise," taken in conjunction with an expression in the subsequent settlement to which I shall presently refer, point to a power of raising the charge independent of the term of years. For the present it is sufficient to say that according to grammar, the words "or otherwise," must be taken *ejusdem generis*, with the said ways and means mentioned. The settlement of 1786 is a well-drawn deed. There is no ambiguity whatever about it. The trusts of the term of 100 years are clearly defined, and there is not a word or expression in the deed from which I can infer that the £1200 is charged upon any other interest in the land. The objector relies upon the following words in the recital about the £1200, "which it is intended hereby *effectually* to charge and secure pursuant to the said articles." The word "effectually" is simply explained by the fact that executory articles are being followed up by a regular settlement. Mr. Law relies upon the

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declaration that the trustee may, out of the rents and profits of the *premises*, or by sale or mortgage of such part thereof as shall be sufficient, raise the £1200. It is contended that the words in the articles, "or otherwise," have been explained in the settlement, and that the charge is thus thrown on the premises, that is, on the lands, and not merely on the term of years. But the clause is introduced by the words, "as, and for and concerning the said term of 100 years." It seems to me plain, that "premises" can only mean premises held under the said term.

I therefore fail to see how there is any intention expressed in either articles or settlement that the charge of £1200 should rest on any estate or interest in the lands other than the term of 100 years. I now turn to the cases relied upon on behalf of the objector.

Burrowes v. *Gore* (1) was decided on the ground that inasmuch as the trustees were bound to enter up judgments on warrants of attorney, which they had not done, their neglect in this respect could not be set up as a defence by the owner of the estate, he being himself the representative of the surviving trustee, and as such bound to secure payment of the money secured by the bond. But this case, as pointed out by the Vice-Chancellor in *Rorke* v. *Sherlock* (2) is not satisfactory as laying down any general principle, in consequence of the different views taken by the learned Lords who decided it, but in any view the original intention was absolutely clear. *Greene* v. *Stoney* (3) is distinguishable. It is the case of a badly-drawn deed. The Court inferred from the expressions used in the deed that it was the settlor's intention that the simple contract debts in the schedule, as well as the judgment debts, should be charged on the lands. This construction was necessary to give effect to the settlement in all its parts. *In re Nash* (4) is another instance of a clumsily drawn deed. The last words, in the judgment of Monahan, C.J., sufficiently distinguished it from the case now before me. "It is plain on all legal principles that the creation of a term, which was only a *further* mode of raising the charge, cannot deprive the objects of the power of the priority which they had under the deed of 1810." The case of

(1) 6 H. L. Cas. 907.
(2) Ir. R. 11 Eq. 510, 517.
(3) 13 Ir. Eq. R. 301.
(4) 5 Ir. Ch. R. 396.

Mandeville v. *Roe* (1) in no way assists the objector's contention. It is the case of a man having a power and an estate. Lord St. Leonards there refused to interfere with the settlement, so as to make it fit in with the contingencies which had occurred. The judgment rests altogether upon the intention, as expressed in the settlor's will, to bring the reversionary estate in fee in aid of the power. "Sometimes," says the Lord Chancellor, "the Court must be astute to effect the testator's intent: but it must always keep within the limits prescribed by the rule of law, and never be led further by construction or conjecture." *Ross* v. *Army and Navy Hotel Company* (2) is a good example of a case in which a Court of Equity will give effect to what amounted to an equitable contract. Although the covering deed was void under the Bills of Sale Act, 1878, the Court held the debentures themselves to be in substance contracts that the debenture holders should have a charge upon all the property of the Company. That is a case where we have, to begin with, a valid contract to charge, but the machinery for giving effect to it is inoperative. The covering deed should have been registered; this was neglected through mistake; and the Court gave effect to the contract notwithstanding the mistake.

In these cases we have either an expressed intention to charge, or ambiguous expressions from which that intention could be inferred. In the present case we have neither the one nor the other. The Court cannot go further than the parties themselves have gone. Where clear words have been used there is no place for inference. From the expressed intention to build a house of brick you cannot infer an intention to build a house of granite. Furthermore, I have no reason for supposing that the machinery for raising the money, namely, a term of 100 years after the husband's death, was not amply sufficient. The fact that it has been allowed to expire affords no reason why I should strain the instruments to a meaning which was not within the contemplation of the parties. I therefore overrule the objection and disallow the charge.

Solicitor having carriage: *J. A. French.*

Solicitors for objector: *William Fry & Son.*

W. C. S.

(1) 7 Ir. Eq. R. 253. (2) 34 Ch. D. 43.

V.-C.
1898.
July 11.

JOYNT *v.* MACCABE.

(1897. No. 965.)

Consent—Order staying action—Registration of order as a judgment—Irregularity—Practice.

Where in an action a consent is received, and an order is made staying all further proceedings on the terms contained therein, such an order is not a judgment, or capable of being registered as such.

Motion.

This action, which was brought by Mr. Alfred Lane Joynt against Messrs. Mac Cabe & Bulger, came on for hearing on the 8th June, 1898. A settlement was arrived at between the parties on the terms of the defendants paying within one week the sum of £327 14*s.* 7*d.*, in full discharge of all matters sued on in the action, and the costs when taxed and ascertained. A consent embodying those terms was received by the Court, and an order was made staying all further proceedings in the action. The defendants immediately paid the sum of £327 14*s.* 7*d.* to the plaintiff; but the costs were still due, being as yet untaxed. On the 29th June, 1898, the plaintiff's solicitor brought an attested copy of the order of the 8th June, 1898, to the Records and Writs Office, with the necessary forms filled up, for the purpose of registering the order as a judgment in the Judgment Registry Office, and describing the order as a judgment against the defendants for the sum of £327 14*s.* 7*d.* debt, and for costs unascertained. No intimation was given to the officer that the sum had been paid, and he accordingly entered the order as a judgment in the Cause-book, and also signed the registry forms, which were subsequently lodged in the Judgment Registry Office on the same day. The only notice the defendants received of the entry of the order as a judgment was by a letter, dated the 30th June, 1898, from the plaintiff's solicitor. The judgment appeared in *Kemp's Gazette* of the 4th July, and in *Stubb's Gazette* of the 6th July, 1898.

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The defendants now moved that the judgment entered up on the 29th June, 1898, should be set aside on the following grounds, viz. :—(1) that there was, in fact, no judgment; (2) that at the date of the entering up and registration of the judgment the amount had been paid, and that the costs were not then payable; (3) that the proceedings on the part of the plaintiff in reference thereto were contrary to good faith, malicious, and without justification.

Ronan, Q.C. (with him *Molony*), for the defendants, in support of the application :—

Where the Court receives a consent and makes an order staying all further proceedings on the terms contained therein, such an order is not a judgment. Therefore the plaintiff was clearly wrong in entering the order of the 8th June as a judgment, and subsequently registering it as such on the 29th June. It appears that within the last twenty years, on four occasions, a Chancery judgment has been registered in the Judgment Registry Office; but this practice is, we submit, wrong. The provisions of the Bankruptcy Act, 1857, sects. 335, 336, do not apply to the Chancery Division, but only to the Superior Courts of Common Law (see section 335). Moreover, the provisions of that section do not apply to anything save money levied and goods seized. The plaintiff gave the defendants immediate notice of registration.

O'Shaughnessy, Q.C., and *A. E. R. Joynt*, for the plaintiff, resisted the motion :—

The order is a judgment under which money is to be paid, and under which execution may issue. Although the debt has been satisfied, it may still be necessary to levy the costs when taxed. The defendants are, therefore, right in protecting themselves against the provisions of the Bankruptcy Act, 1857, sects. 335, 336. Though these sections only mention Courts of Common Law, still there is now but one High Court (see Judicature Act, sect. 21). Even assuming this was not in form a judgment, being an order of the Court, it is enforceable as a judgment; Order XLII., R. 6.

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Molony, in reply, cited *Cremetti* v. *Crom* (1); *O'Malley* v. *Brabazon* (2).

THE VICE-CHANCELLOR:—

On reading this notice of motion at first, I was struck by the fact that it seeks to set aside a judgment, and this is certainly the way in which the notice is framed, though no judgment was ever pronounced.

I am of opinion that there has been an irregularity in this case, which came about in this way, viz., in taking what is erroneously called the judgment over to the Records and Writs Office, and getting the clerk to make an entry of the order of the 8th of June, as if it were a judgment of the Court. It was not a judgment of the Court, and it was never pronounced as a judgment. When the case was called, it was stated that a settlement had been arrived at, and after some discussion it was agreed that it should be in the form of an actual payment by the defendant of £327 as damages, and the costs when ascertained. It became unnecessary therefore that any judgment should be pronounced, and all that was done was to make an order which precluded the necessity of going on with the case and delivering judgment. When, however, the order was taken over to the Clerk of the Records and Writs Office, it was entered not as an order but as a judgment for £327 and costs. This was a mistake, as I did not give judgment for £327, but merely stayed the action upon the terms of the defendant paying £327 and costs. I think it was an entire mistake for the solicitor for the plaintiff to go into the office and get an entry made describing this in an erroneous way. As to there being any motive in the case, I do not think it has been shown.

The proper course is to set aside the entry in the cause book, and then everything in connection with that entry, including the registration, will fall with it. I must therefore make an order vacating the entry of this order in the cause book as a judgment, and I shall also set aside, as I have power to do, the entry in the registry of judgments.

I do not impute any *mala fides* to the plaintiff's solicitor

(1) 4 Q. B. D. 225. (2) 15 L. R. Ir. 561.

who was acting under advice; but it was wrong for him not to have informed the officer of the Records and Writs Office that the money had been paid. Otherwise the Clerk of Records and Writs would have taken care to have stated that fact, or to have obtained authority to do so if necessary.

I shall therefore grant the motion with costs.

Solicitors for the defendants: *Gerrard & Co.*
Solicitor for the plaintiff: *Joynt.*

J. MAC M.

BENNETT *v.* MACCABE.

(1898. No. 404.)

Practice—Costs—Taxation of, between party and party—Allowance of third counsel on motion—Report of judgment for use in Court of Appeal.

In an action by a shareholder against directors for fraudulent misrepresentation in a prospectus, a motion was made by one of the defendants to set aside an order giving liberty to serve him with the writ out of the jurisdiction; the motion was refused by the Master of the Rolls with costs, and his order was affirmed by the Court of Appeal with costs.

On the hearing of the motion in both Courts three counsel were briefed for the plaintiff. The plaintiff's solicitor obtained from the reporter to the Council of Law Reporting in Ireland a copy of the judgment of the Master of the Rolls, and paid him a fee of £2 2*s.* for it; he also prepared copies of the judgment for the use of the Judges of the Court of Appeal.

The Taxing Master disallowed the costs of a third counsel; he also disallowed a portion of the amount paid for the report of the judgment on the ground that it could have been got cheaper from an ordinary short-hand writer, and he disallowed the costs of the copies for the Court of Appeal on the ground that it was the duty of appellant (the defendant), and not of the respondent (the plaintiff) to lodge copies for the use of the Court.

Held, by the Master of the Rolls—(1) that on the taxation of the costs of an ordinary interlocutory motion the costs of not more than two counsel should be allowed, and that the discretion of the Taxing Master disallowing the costs of a third counsel should not be interfered with; but (2), that the reporter to the Council of Law Reporting was the proper person from whom to obtain a report of the judgment, and that the entire fee paid to him by the plaintiff's

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solicitor, and the charge for making copies for the use of the Court of Appeal should be allowed.

MOTION.

This was a motion on behalf of the plaintiff to review the taxation of certain items in the plaintiff's bill of costs. The action was one of a number of actions brought by the plaintiff and others, shareholders in the Components Tube Company, Limited, against E. T. Hooley, and other directors of that Company, claiming damages for fraudulent misrepresentations in the prospectus of the Company, and for conspiracy. The defendant Hooley resided in England, and the leave of the Court was obtained, on May 14th, 1898, to serve a concurrent writ upon him out of the jurisdiction. The defendant Hooley, on June 28th, 1898, moved to discharge the order of May 14th. Three counsel appeared on behalf of the plaintiff to resist the motion, and it was refused with costs. The defendant Hooley appealed from the order refusing to set aside the service of the writ upon him to the Court of Appeal ; three counsel appeared on behalf of the plaintiff in the Court of Appeal, and on July 11th, 1898, the appeal of the defendant was dismissed with costs. The plaintiff's solicitor obtained from the reporter to the Council of Law Reporting in Ireland a report of the judgment of the Master of the Rolls, delivered on June 28th, and paid him a fee of £2 2*s.* for the report. The plaintiff's solicitor also prepared four copies of the judgment for the use of the Court of Appeal, which were handed in by him to the Registrar, and used by the members of the Court of Appeal.

On the taxation of the plaintiff's costs of the motion and of the appeal, the Taxing Master disallowed, amongst other items, the charges for preparing a brief for the second senior counsel in the Court below and in the Court of Appeal, and the fees paid to him, which were £3 3*s.* and £7 7*s.* respectively, on the ground that in the exercise of his discretion he was of opinion that it would not be reasonable or right to allow the expense of a third counsel as against the opposite party. The Taxing Master also declined to allow the £2 2*s.* paid for the report of the judgment, on the ground that a report could have

been got at less expense from an ordinary short-hand writer, and reduced the amount by the sum of 10*s.* 4*d.*, allowing the following charges for the costs of the report:—"For first hour occupied, 10*s.* 6*d* ; for subsequent part of an hour, 6*s.* 8*d.* ; for transcribing of the report, 29 folios at 6*d.* per folio, 14*s.* 6*d.* Total amount allowed, £1 11*s.* 6*d.*"

The Taxing Master stated that in the absence of any express rule of Court on the subject, the allowance to short-hand writers for reports of judgments was according to the practice of the Taxing Officer, regulated by analogy, in accordance with the provisions of Order LXV. Rule 60 (Costs of Short-hand Notes), and that the above allowances were in accordance with the provisions of that rule.

The Taxing Master also disallowed the sum of £2, charged for four copies of the judgment of the Master of the Rolls for the use of the Court of Appeal, on the ground that it was the duty of the solicitor for the appellant, the defendant Hooley, to obtain and lodge copies of the judgment for the use of the Court of Appeal, and that the appellant's solicitors had fulfilled their duty in that respect to the best of their means. The Taxing Master referred to an affidavit made by the assistant of the appellant's solicitors, who deposed that he had obtained a copy of the judgment, and had copies of it ready in the Court of Appeal, on July 11th, the day of the hearing of the appeal.

T. L. O'Shaughnessy, Q.C. and *A. E. R. Joynt*, for the plaintiff:—

1. The motion was a very important one, and the costs of three counsel should have been allowed. The action was a test action, and the other actions brought against the same defendants had been stayed by order of the Court, pending the trial of the present action. There is no rule limiting, for the purposes of taxation, as between party and party, the number of counsel to two upon a motion: *In re South Meath Election Petition* (1). In a recent case in the Queen's Bench Division of *In re Corless* (2), on a motion to set aside an award on the ground of misconduct of

(1) 32 L. R. Ir. 407. (2) Since reported [1899] 2 Ir. R. 29.

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arbitrators, the Court on a motion to review taxation, allowed the costs of a brief to a third counsel. Here the senior counsel were retained and both had to be briefed, but the fees paid to each were very moderate and should be allowed, having regard to the principles laid down in *Robb* v. *Connor* (1).

2. The fee paid for the report of the judgment and the costs of the copies should have been allowed. The report of the judgment was obtained from the reporter to the Council of Law Reporting, and was revised by the judge. It was essential for the plaintiff's solicitor to get it, and to have copies for the Court of Appeal: *Jessop* v. *Cusack* (2).

Serjeant Dodd and *Gerald Fitz Gibbon*, for the defendant Hooley:—

1. The motion was not of sufficient importance to allow the costs of a third counsel, as between party and party. There is no case where the Court has interfered with the discretion of the Taxing Master where he has refused to allow more than two counsel on an interlocutory motion. The rule is different in the case of the trial of an action of importance, such as that of *M'Learn* v. *Cooke* (3), which was an action for specific performance, or in a case like *In Re Corless* (4).

2. The amount paid for the report of the judgment is not disputed by the defendant, but it was the duty of his solicitor as appellant to get it, and to lodge copies for the use of the Court of Appeal, and he did both.

Joynt, in reply.

THE MASTER OF THE ROLLS:—

The practice of the Taxing Masters in taxing the costs of ordinary interlocutory motions is not to allow the costs of more than two counsel. During the argument I asked the registrar to ascertain what was done in the important case of *The*

(1) Ir. R. 9 Eq. 373.
(2) 25 L. R. Ir. 244.
(3) Decided by the Vice-Chancellor, June 21, 1898, and since reported—[1899] 1 Ir. R. 66.
(4) Since reported [1899] 2 Ir. R. 99.

Attorney-General v. *The Drapers' Co.* (1), which came before me a few years ago, on a similar application by the defendants to set aside the service of the writ upon them out of the jurisdiction, and I found that the costs of two counsel only were allowed on that motion, though three appeared. It may be right for a solicitor in a particular case to brief three counsel on an interlocutory motion, although the usual practice is to allow the costs of only two as between party and party. The Taxing Master must exercise his discretion within legal limits in each case. There may be cases in which the costs of more than two counsel will be allowed, even though only two at most can be heard. It must, however, be remembered that one counsel is usually competent to deal with an ordinary motion, and that it is very unusual that more than two should be briefed, as two only can be heard. I do not wish to lay down any general inflexible rule. For instance, the costs of three counsel might, perhaps, with propriety be allowed on a motion in an election petition matter, or on a motion to set aside an award which may dispose finally of the rights of the parties, as was the case recently before the Queen's Bench Division, referred to during the argument (2). But is the present case one in which I should interfere with the discretion of the Taxing Master? I asked counsel for the plaintiff if he could refer me to any case of an ordinary interlocutory motion in which the fees of a third counsel had been allowed by the Court when the Taxing Master had disallowed them, but he could not refer me to any such case. It is said that this action was a very important one to the parties, and that an order had been made by the Court, consolidating several other actions with the present action, and that this was a test case. But the question I have to decide cannot be governed by such considerations. As to the amount of fees, no question is raised, they were extremely moderate. I may add that the amounts demanded in this and the other actions consolidated with it are not great. That the Judge delivered a judgment upon the motion instead of simply saying "be it so," or "no rule," ought not to be considered in reference to the question of the number of counsel previously retained to argue it.

(1) [1894] 1 Ir. R. 185. (2) *In re Corless*—since reported, [1899] 2 Ir. R. 29.

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The other items in dispute deal with the amount paid to the reporter of the Council of Law Reporting for a copy of the judgment, and the cost of copies of that judgment made for the use of counsel in the Court of Appeal, and for the use of the members of that Court. The Taxing Master says that there is no Court reporter; that is so, but the solicitor for the plaintiff obtained a copy of the judgment from one of the reporters of the Council of Law Reporting, from whom copies of judgments are usually obtained by the parties, with whom the Judges are in constant communication, and whose drafts—and whose drafts only—are revised by the Judges. Suppose each party in a case were to employ a different reporter, the two reports might be inconsistent, and it would be unreasonable to ask the Judge to revise the drafts of each such reporter. The reporter appointed by the Council who publish the authorised reports, takes a report of the case and of the judgment. He is a competent member of the Bar upon whom the Judge places reliance; and the Judge revises his report when it is furnished to him, as was done in the present case. The amount charged for the copy of the judgment is not questioned by the defendant. The Taxing Master says that a report could have been got for less from any ordinary short-hand writer; but I am of opinion that the parties are not to go about in pursuit of a cheap report. It was the duty of the plaintiff's solicitor to obtain a report of the judgment in this case. The defendant was a person out of the jurisdiction, a bankrupt, and over whom the plaintiff had no control; and it would have shown a real want of judgment on the part of his solicitor, to say the least, if he had not taken out a copy and prepared it for the use of his counsel in the Court of Appeal? It is said that it is the duty of the appellant to take out a copy of the judgment, and provide copies for the use of the Court of Appeal. There is no rule of the Court of Appeal to that effect. The Court always asks for a copy of the judgment of the Court below, and is glad to get it from either appellant or respondent. I speak from my own experience as a member of that Court. *Prima facie*, no doubt, the appellant ought to have the judgment; but in the present case the respondent had it. Was the respondent to prepare copies at his own expense, or was he bound to trust to the appellant bei there prepared with copies? I do not think

that he was bound to do so, although it turned out that on the 11th, the day the appeal came on to be heard, copies prepared by the appellant's solicitors were ready in Court.

I am therefore of opinion that, under the special circumstances of this case, all the items relating to copies of the judgment should be allowed, and that the ruling of the Taxing Master in this respect must be altered; but as regards the costs of three counsel, I am of opinion that the exercise of his discretion by the Taxing Master ought not to be interfered with. As each party has succeeded in part, I say nothing as to the costs of the motion.

Solicitor for the plaintiff: *Joynt.*
Solicitors for the defendant Hooley: *Casey & Clay.*

W. L.

IN RE DOYLE AND O'HARA'S CONTRACT.

Landlord and tenant—Lease—Covenant against subletting without consent—Assignment without consent—Vendor and purchaser—Summons—Appeal—Final or interlocutory order—Practice.

A lease contained a covenant by the lessee not to set or demise the demised premises without the consent of the lessor. The lessee sold the premises, and the lessor gave his consent, which was indorsed on the assignment. The assignee Doyle then put the premises up for sale and O'Hara purchased them. O'Hara required the assignment to be made with the consent of the lessor. Doyle refused to obtain the lessor's consent, and the purchaser refused to complete:—

Held (by the Master of the Rolls), on a summons under the Vendors and Purchasers Act, that, by the covenant, the assignee was restrained from assigning without the lessor's consent.

Held, by the Court of Appeal (reversing the decision of the Master of the Rolls), that the covenant only restrained subletting without consent of the lessor, and that it was not necessary that the consent of the lessor should be obtained to make title.

Greenaway v. *Adams* (12 Ves. 395) distinguished.

An order made on a summons under the Vendors and Purchasers Act is, for the purposes of an appeal, an interlocutory order.

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SUMMONS under the Vendors and Purchasers Act, asking to have it determined that the vendor Thomas Doyle (assignee of the lease) had shown good title to the leasehold premises contracted to be sold.

The facts appear in the judgment of the Master of the Rolls.

Samuels, Q.C., and *Corvan*, for the vendor :—

The Right Hon. The Mac Dermot, Q.C., and *P. A. O'C. White*, for the purchaser :—

THE MASTER OF THE ROLLS :—

The point raised by the summons in this case and argued before me, is a short one, namely, whether under the terms of the lease of the 9th October, 1854, the vendor Thomas Doyle, is bound to obtain the consent of the lessor or his agent to the assignment by Thomas Doyle of his interest in the lease to the purchaser Peter O'Hara. The lease in question is dated the 9th October, 1854, and is from John D'Arcy, brewer, to Denis Doyle, his executors, administrators and assigns, of a public-house in Fleet-street, Dublin, for a term of 500 years, at the rent of £101 13*s.* a-year. It contains no covenant against alienation strictly so-called, but it does contain the following covenant : "And the said Denis Doyle doth hereby for himself, his executors, administrators and assigns, covenant, promise and agree to and with the said John D'Arcy, his heirs, executors, administrators and assigns, that he the said Denis Doyle, his executors, administrators, or assigns, shall not nor will during the continuance of the term hereby granted, without the consent in writing for that purpose of the said John D'Arcy, his heirs, executors, administrators or assigns, first had and obtained, set or demise the said hereby demised premises to any person or persons whomsoever." The lease contains covenants by the lessee, his executors, administrators and assigns, and undertenants, not to carry on any business on the premises except that of a vintner or a grocer, and not to sell any porter except that of John D'Arcy ; but the question I have to decide turns on the covenant which I have read. Does this covenant come within the provisions of section 10 of Deasy's Act, which

provides that when a lease contains an agreement restraining or prohibiting assignment it shall not be lawful to assign the lands contrary to such agreement without the consent in writing of the landlord or his agent lawfully authorised. Apart from authority, I should think that the question to be considered by a conveyancer in a case of this kind would be, whether the covenant came within section 10 of Deasy's Act, or section 18, which prohibits subletting without the consent of the landlord or his authorised agent when a lease has been made containing an agreement against subletting.

There is a distinction recognised by the statute between cases coming within these two sections, and the covenant could not well come within both. Looking at the covenant from that point of view, I should be disposed to say that it came within section 18. But the case is not free from authority. I need not refer to the cases which decide that a sub-demise is not a breach of a covenant against assignment, for it does not follow that the converse is the case. Two cases have been referred to as directly in point. The first is a very old case of *Cox* v. *Brown* (1), decided so far back as the year 1656. The case is not fully reported, and there is a difficulty in understanding what was the exact point decided. The report states that it was a bill to be relieved against the forfeiture of a lease, in which there was a covenant that if the lessee should let the premises for any longer term than three years, except to the wife or children of the said lessee, without license of the lessor or his assigns first had, then the lease to be void. That the defendants entered on the premises on pretence that the executors of the lessee did alien the same to the plaintiff without license, and had ousted the plaintiff who purchased the same. The report then states: "This Court after reading precedents, forasmuch as the executors sold the lease for payment of debts to which the same was liable, and if she had not been executrix there had been no forfeiture, the Court decreed the plaintiff to be relieved against the said forfeiture."

There is no case after this till the year 1806, when *Greenaway* v. *Adams* (2) was decided. That case, in my opinion, rules this case so far at least that I must decide on a vendor and

(1) 1 Ch. Rep. 90. (3) 12 Ves. 395.

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purchaser summons that this property is not one which can be forced upon the purchaser as being one to which title has been shown. It is no doubt the duty of the Judge on a vendor and purchaser summons to decide a question of law, if raised, and he cannot avoid that duty by saying that the title is too difficult to be forced upon the purchaser. The Court is to a large extent in the same position as if an action for specific performance was before it. Still the position of the parties should be considered, and if I had any doubt upon the question raised I think that I should decide in such a way as not to do irreparable injury to one of the parties.

It unfortunately happens, as I have had occasion to remark in other cases under the Vendor and Purchaser Act, that the Court has to decide between vendor and purchaser alone, in the absence of persons whom the decision will not bind, questions of law, which afterwards may be ransacked in another proceeding by third parties not bound. For example in the present case Messrs D'Arcy the lessors are not parties to this proceeding; they cannot be brought in, and cannot be bound by my decision. They could try the question of the validity of an assignment by an action for the penal rent. So in other cases I have had to decide questions affecting the rights of infants, who are not parties to the proceedings and could not be bound by them.

Still if the facts are clear, a decision must be given upon them. *Greenaway* v. *Adams* (1) is, in my opinion an authority in point, and binding upon me, as a Judge of first instance. It was a decision of Sir William Grant, Master of the Rolls. The covenant there was, "that the said John Adams, his executors, or administrators, shall not nor will at any time hereafter let, set or demise the before mentioned messuage or tenement and premises or any part thereof, to any person or persons whomsoever for all or any part of the said term of twenty-six years hereby demised without the consent in writing of the said John White and Elizabeth Judith his wife, or the survivor of them, or the heirs and assigns of the said John White, for that purpose first had and obtained." Here the words are "set or demise." In the covenant I have just

(1) 12 Ves. 395.

read they are "let, set or demise," but "let" and "set" are the same thing. Mr. Samuels did not rely on this distinction, but he did rely on the fact that in *Greenaway* v. *Adams* (1) the prohibition is against subletting "for all or any part of the term," while in the present case it is against subletting simply. I do not think that that distinguishes *Greenaway* v. *Adams* (1) from this case. In the argument of *Greenaway* v. *Adams* (1) counsel for the plaintiff relied on the form of the covenant: "The construction cannot be that an underlease only is prohibited. The expression is 'for all or any part of the term.' A transfer for all the term is nothing but an assignment." The Master of the Rolls in his judgment does not expressly refer to this: he says: "I have no doubt upon the construction of this covenant. This case is not like *Crusoe* v. *Bugby* (2) where all the words of the covenant could have distinct effect and operation, without referring at all to an underlease, and it did not necessarily follow that the lessor, as he did not choose that the tenant should assign, therefore intended to restrain subletting. But, upon the other hand, it would be very strange, if the landlord meant to restrain underletting, that he should not mean to forbid the tenant to part with the whole interest. Clearly, both according to the letter and spirit, this covenant did restrain assignment without licence." The lease from John D'Arcy does not contain the words "for all or part of the said term," but, as I have said, I am of opinion that that makes no valid distinction; the lessee could, if there were no prohibition, subdemise the premises for the whole term less one day, and inasmuch as since Deasy's Act the relation of landlord and tenant can exist without any legal reversion he could sub-demise for the whole term; and such a sub-demise would be within the words "set or demise" *simpliciter*. I cannot draw any solid distinction between *Greenaway* v. *Adams* (1) and this case, and I am of opinion that it rules this case. If I had a doubt on this point I ought to decide against the vendor, as if I held that an assignment would be no breach of this covenant, and the landlord in the case of a lease containing a clause of forfeiture afterwards brought an ejectment and maintained it successfully against the purchaser, irremediable

(1) 12 Ves. 395.

(2) 2 W. Bla. 766; 3 Wils. 234.

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mischief would have been done. In this lease there is no clause of forfeiture, but there is a penal rent. I must hold, therefore, that the vendor is bound to obtain the consent of the lessor to the assignment, and that that not being done, a good title has not been shown to the premises.

W. L.

Appeal. May 11.

The vendor appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ.).

Samuels, Q.C., and *Corvan*, for the appellant.

P. A. O'C. White, for the respondent:—

There is a preliminary objection to hearing this appeal. The appeal is from a final order; it should have been on a fourteen days' notice, but only a four days' notice has been served. Order LVIII., Rule 3.

Samuels, Q.C.:—

The order was made by the Master of the Rolls on a vendor and purchaser summons: it was therefore made in a matter "not being an action," and the time for appeal is the same as from an interlocutory order: Order LVIII., Rule 9, *In re Baillie's Trusts* (1), *In re Blyth and Young* (2).

Per Curiam:—

The cases cited show that the notice is quite regular.

Samuels, Q.C., and *Corvan*, for the appellant:—

In *Greenaway* v. *Adams* (3), the covenant not to "let, set or demise the premises, or any part thereof, for all or any part of the term," was virtually a covenant not to assign. In England, a subdemise for the whole term of the demise, as it leaves no reversion in the lessor, is an assignment. But the covenant in this lease

(1) 4 Ch. D. 785. (2) 13 Ch. D. 416. (3) 12 Ves. 395.

does not forbid assignment. Such covenants are to be construed strictly: *M'Kay* v. *M'Nally* (1). In Ireland, owing to the effect of Deasy's Act, a sublease for the entire term is not an assignment: *Seymour* v. *Quirke* (2). [They also cited *Lessee of Porter* v. *French* (3), *Ireland* v. *Landy* (4), *Kemp* v. *Bird* (5), *Verschoyle* v. *Perkins* (6).]

The Right Hon. The Mac Dermot, Q.C., and *P. A. O'C. White*, for the respondent:—

Greenaway v. *Adams* (7) is an express authority in our favour: it is recognised as law by the practice of conveyancers: Davidson, vol. v., part 1, p. 193: Jarman and Bythewood, vol. iii., p. 209 (4th ed.). The lessor's consent was obtained on the previous assignment.

LORD ASHBOURNE, C.:—

This appeal raises an interesting point which I can well understand, caused anxiety to the advisers of the respondent on account of the statements contained in the text books, but our decision rests upon considerations directed to a few simple facts.

By lease dated 9th October, 1854, John D'Arcy demised a public-house to Denis Doyle for a term of 500 years, at a rent of £101 13*s.* per annum. The lease contains a covenant by the lessee in these terms:—"And the said Denis Doyle doth hereby for himself, his executors, administrators and assigns, covenant, promise and agree to and with the said John D'Arcy, his heirs, executors, administrators and assigns, that he the said Denis Doyle, his executors, administrators and assigns, shall not, nor will during the continuance of the term hereby granted, without the consent in writing for that purpose of the said John D'Arcy, his heirs, executors, administrators or assigns, first had and obtained, set or demise the said hereby demised premises to any person or persons whomsoever." The lease contains no express covenant against assignment without license.

The lessee's interest in the lease was purchased by the appellant in the year 1894, but no difficulty such as that now raised occurred

(1) 4 L. R. Ir. 438.
(2) 14 L. R. Ir. 97, 455.
(3) 9 Ir. L. R. 514.
(4) 22 L. R. Ir. 403.
(5) 5 Ch. D. 549.
(6) 13 Ir. Eq. R. 72.
(7) 12 Ves. 395.

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upon that occasion, because the lessor then consented to the assignment.

Quite recently, however, the assignee put the premises up for sale and the respondent was declared purchaser, at the price of £3500. Upon investigation the title was found to be quite clear, but the lessor refused to give his consent in writing to the assignment, thus raising the question (which did not arise before), whether the covenant which I have read, though only expressly mentioning "setting" or "demising," amounts to a covenant against alienation; in other words, whether the covenant brought the case within the terms of section 10, or of section 18 of the Landlord and Tenant Act of 1860.

The Master of the Rolls states that apart from authority he should have been disposed to say that the covenant came within section 18. But the learned Judge held that the decision in *Greenaway* v. *Adams* (1) ruled this case, and that following that decision he was bound to decide in a proceeding like the present, that this property was one which could not be forced on a purchaser, unless the lessor's consent in writing was obtained to the assignment.

This Court is bound to decide this question, having regard to the terms of the covenant, upon the arguments which have been addressed to us.

In my opinion, *Greenaway* v. *Adams* (1), is distinguishable from the present case. The subject-matter of the demise there was, as here, a public-house, and the covenant upon the construction of which the decision turned was as follows:—"And also that the said John Adams, his executors or administrators, shall not nor will at any time or times hereafter let, set, or demise the before mentioned messuage or tenement and premises or any part thereof to any person or persons whomsoever for all or any part of the said term of twenty-six years hereby demised without the consent in writing of John White, &c." Upon that covenant it was argued, not only from the nature of the provision, but also from the expressions used, that there was a clear intention in the minds of the contracting parties to prevent the assignment of the subject-

(1) 12 Ves. 395.

matter demised without the consent of the lessor. It was pointed out that the terms of the covenant were not, that the lessee would not "let, set, or demise," *simpliciter*, but that it was a covenant not to let, set, or demise "for all or any part of the term," and it was argued that a transfer for all the term was nothing but an assignment. The Court adopted this argument, and held that "both according to the letter and the spirit this covenant did restrain assignment without license."

On the terms of the lease in *Greenaway* v. *Adams* (1), it would be difficult to come to any other conclusion, for it is impossible to see any difference except in phraseology between a covenant restraining alienation of a public-house and a covenant restraining subletting the same for the entire term for which it was held. On the other hand, in the covenant entered into between John D'Arcy and Denis Doyle, there is nothing whatever to indicate that the parties were thinking of the entire interest in the term. It may well be that the landlord had no objection to the premises being assigned while he had an objection to their being sublet.

In any event the breach of this covenant would involve the lessee in liability to a penal rent, and we must therefore construe it strictly, and be careful not to extend it to a case which does not expressly fall within its provisions.

I am therefore of opinion that it is not necessary for the vendor, in order to confer a valid title to the premises, to procure the consent in writing of the lessor to the assignment of the premises. The decision appealed from must be reversed.

FITZ GIBBON, L.J.: —

It appears to me that, if *Greenaway* v. *Adams* (1) applies to the present case, we should not force this title upon the purchaser, having regard to the length of time during which that authority has been recognised. I therefore think that this appeal depends on the effect and application of the decision in that case. Jarman and Bythewood first lay down (3rd ed. vol. iv., p. 371) "that clauses restrictive of alienation generally do not extend to underleases," and then they say that "the converse of the proposition is equally true,

(1) 12 Ves. 395.

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namely, that a restriction on underletting is not broken by an assignment." This distinction is by no means unreasonable; for, as an assignee subjects himself to the lessee's covenants, which run with the land, and an underlessee does not, a lessor may choose to restrain the latter species of alienation only. "But a covenant not to let, set, or demise *for the whole* or any part of the term, has been held to extend to an assignment: *Greenaway* v. *Adams*" (1). Davidson says (vol. v. Pt. 1, p. 193, 3rd edit.): "A restriction on assignment, however generally expressed, does not prohibit an underlease: *Crusoe* d. *Blencow* v. *Bugby* (2), . . . but whether a restriction on underletting would prohibit an assignment seems doubtful (*Greenaway* v. *Adams* (1)). But both assignment and underletting are restrained by a condition 'not to set, let, or assign over' (*Roe* d. *Gregson* v. *Harrison* (3)); or by a condition 'not to assign or otherwise part with the premises for the whole or any part of the term' (*Doe* d. *Holland* v. *Worsley* (4); or by a covenant 'not to let, set, or demise the premises for all or any part of the term.'" For this last proposition *Greenaway* v. *Adams* (1), and it alone, is again cited. These two references to the case make it plain that the learned text-writer thought that the decision rested on the special terms of the covenant.

There is a distinction between the present case and *Greenaway* v. *Adams* (1). There the covenant was that "John Adams, his executors and administrators," without any mention of "assigns," "shall not . . . let, set, or demise . . . the premises or any part thereof to any person . . . for all or any part of the said term." Here the demise is to "Denis Doyle, his executors, administrators, *and assigns*": the lessee's covenants are made "for Denis Doyle, his executors, administrators, *and assigns*"; and the assigns are not spoken of as "licensed assigns." Further, the covenant on which the question now turns runs "that he, Denis Doyle, his executors, administrators, *or assigns*, shall not during the continuance of the term, without consent in writing of John D'Arcy, his heirs, executors, administrators, or assigns, set or demise the premises to any person or persons whomsoever, nor will he the

(1) 12 Ves. 395.
(2) 2 Wm. Bl. 766.
(3) 2 T. R. 425.
(4) 1 Camp. 20.

said Denis Doyle, his executors, administrators, *or assigns*, or his or their undertenants," exercise without such consent as aforesaid any trade on the premises except that of a vintner. Plainly therefore, the parties contemplated assignment of the premises by Denis Doyle, as well as underletting, as a possible event; and the restriction is imposed in express terms only upon the latter mode of dealing with the demised premises, and is imposed upon the assigns of the lessee, *eo nomine*, in the same terms as upon the original lessee himself.

What was the *ratio decidendi* in *Greenaway* v. *Adams* (1)? I read from the argument for the plaintiff:—"The intention of both parties to prevent assignment is clear, not only from the nature of the provision, but also from the expressions that are used. The construction cannot be that an underlease only is prohibited: the expression is 'for all or any part of the term.' A transfer for all the term is nothing but an assignment." This argument was thus met:—"The distinction between covenants against assigning and underletting is clearly settled. In *Crusoe* v. *Bugby* (2) the most general words were held not to restrain an underlease; and the Court notices the distinction between a partial and a total change of occupancy. In *Doe* v. *Carter* (3) also the words were very general. Since these authorities a clear difference has been marked between a covenant restraining an underlease and a covenant against assignment of the whole interest. Provisoes in all covenants are to be construed strictly." Having regard to these arguments, there is no doubt as to the meaning of the decision. The Judge says, "I have no doubt upon the construction of this covenant. This case is not like *Crusoe* v. *Bugby* (2), where all the words of the covenant could have distinct effect and operation, without referring at all to an underlease; and it did not necessarily follow that the lessor, as he did not choose that the tenant should assign, therefore intended to restrain underletting. But, upon the other hand, it would be very strange, if the landlord meant to restrain underletting, that he should not mean to forbid the tenant to part with the whole interest. Clearly, both according to the letter and the spirit, this covenant did restrain assign-

(1) 12 Ves. 395. (2) 2 Wm. Bl. 766; 3 Wils. 234. (3) 8 T. R. 57.

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ment without license." The only way in which the covenant did by the letter restrain assignment was by restraining subletting for *all* the term, and this in the particular case had to be read, and was read, as equivalent to a restraint on assignment. The application of *Greenaway* v. *Adams* (1) therefore depends upon the fact that the letter of the covenant did there restrain assignment. The letter of the covenant between Denis Doyle and John D'Arcy does not restrain assignment, and as such covenants are to be construed strictly, I am of opinion that the contention of the vendor is right.

No doubt the lessor is not before the Court. But in almost all cases under the Vendor and Purchaser Act, the possible claims of parties not before the Court have to be considered, and we should almost entirely destroy this summary procedure if we refused to decide a question of this kind on the ground that our decision involved a decision upon the rights of the lessor.

Walker and Holmes, L.JJ., concurred.

Solicitor for the vendor: *William Huggard.*
Solicitor for the purchaser: *James Lawlor.*

G. Y. D.

(1) 12 Ves. 395.

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(1898. No. 232.)

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June 4, 10, 21.

Renewable lease—Covenant—Construction—Purchase of reversion in fee by assignee of covenantor—Graft—Equitable right—Delay—Laches.

A covenant by a middleman (whose lease contained a *toties quoties* covenant for renewal by his lessor) to renew a lease as often as his own lease is renewed, or any extended interest granted, does not bind a purchaser from the covenantor in respect of any further interest in the premises acquired by such purchaser.

The fee-simple being conveyed to such purchaser is not affected by a covenant to which the fee in the hands of the vendor is not liable.

Circumstances under which *laches* held to be a bar to an equitable claim.

By lease dated October 1st, 1804, the Marquis of Donegall demised to Thomas Ludford Stewart certain premises in Belfast for two lives (since expired), and ninety-nine years, from the 1st of May, 1804.

By lease dated 25th September, 1806, Thomas Ludford Stewart demised a portion of the premises comprised in the lease of October 1st, 1804, to Francis M'Cracken for ninety-four years, from the 1st of November, 1806, subject to the rent of £42 18*s*.

On 5th August, 1811, the assignees in bankruptcy of Francis M'Cracken, in consideration of the sum of £500, assigned the premises comprised in the lease of 25th September, 1806, to William Simms, James M'Cleery, and James M'Adam, as tenants in common, for the residue of the term of ninety-four years, then unexpired.

By deed dated October 31st, 1812, James M'Cleery assigned unto William Simms and James M'Adam his one-third share of the premises before mentioned.

By lease dated 29th April, 1825, William Simms and James M'Adam demised to Samuel M'Birney the above-mentioned premises (with others) for seventy-one years, from 1st May, 1825, at the yearly rent of £80. This lease contained the following

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covenant:—"And the said William Simms and James M'Adam do hereby for themselves, their heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said Samuel M'Birney, his heirs, executors, administrators, and assigns, that they, the said William Simms and James M'Adam, their heirs, executors, administrators, and assigns, shall and will from time to time, and at all times hereafter, give, grant, and demise unto the said Samuel M'Birney, his heirs, executors, administrators, or assigns, on the said Samuel M'Birney, his heirs, executors, administrators, or assigns, paying the fair proportion of such renewal fine as shall be payable out of the said demised premises with others, a renewal or new lease of such further or other term, time, or increased interest, whether for lives renewable, or lives or years, or how otherwise soever, which they, the said William Simms and James M'Adam, their heirs, executors, administrators, or assigns, shall or may obtain, or be entitled to, of said premises from the Marquis of Donegall, or other person or persons having the right, power, or authority, to give or grant any such renewal or further increased interest of the same."

By lease dated May 1st, 1826, Samuel M'Birney demised the premises comprised in the lease of 1806, to John Busby for seventy years, from May 1st, 1825, at the yearly rent of £36 9*s.* 5*d.* This lease contained the following covenant:—"And the said Samuel M'Birney doth hereby for himself, his heirs, executors, administrators, and assigns, covenant and promise and agree to and with the said John Busby, his heirs, executors, administrators, and assigns, that in case the said Samuel M'Birney, his heirs, executors, administrators, or assigns, shall or may at any time hereafter procure or obtain any renewal or new lease, or further or other extended term or interest of any kind whatsoever, in and to the said premises, that then, and in that case, the said Samuel M'Birney, his heirs, executors, administrators, and assigns, shall and will from time to time, and at all times hereafter, give and grant unto the said John Busby, his heirs, executors, administrators, or assigns, a renewal or new lease of said premises for such further and other term as he the said Samuel M'Birney, his heirs, executors, administrators, or assigns, may procure of the whole of said premises, upon the said John Busby, his heirs, executors,

administrators, or assigns, first paying a full and fair proportion of such renewal fine and fines from time to time as the said Samuel M'Birney, his heirs, executors, administrators, or assigns, shall or may be obliged to pay, and all rent and arrears of rent due out of the premises hereby demised."

By deed dated 23rd June, 1830, William Simms and James M'Adam assigned and conveyed to Robert Getty all their estate and interest under the lease of 1806, in the thereby demised premises, in consideration of the sum of £1600, subject to the payment of the rent and performance of the covenants. There was no reference to the lease of 29th April, 1825.

By deed dated 31st August, 1831, Samuel M'Birney, in consideration of £150, assigned all the premises demised to him by the lease of 29th April, 1825, to John Getty, "for the residue of the said term of seventy-one years, granted by said lease of 29th April, 1825, and for all and every such further or extended term or terms as might be obtained of said premises pursuant to the covenant for renewal in said indenture of lease contained," subject to payment of the rent and performance of the covenants. And John Getty thereby acknowledged that the sum of £150 paid by him as the consideration money was the proper money of Robert Getty, and that he was merely a trustee for the said Robert Getty.

By indenture dated April 20th, 1829, the Marquis of Donegall demised to Thomas Ludford Stewart the premises comprised in the lease of 1806, to hold for three lives therein named, with a covenant for perpetual renewal at the yearly rent of £30 9*s.* 2½*d.*

The interest of Thomas Ludford Stewart in the lease and premises afterwards legally vested in James Arthur Wall, and by deed dated November 16th, 1847, the then Marquis of Donegall granted the premises comprised in the indenture of lease of April 20th, 1829, to James Arthur Wall, "to hold the same unto and to the use of the said James Arthur Wall, his heirs, and assigns for ever . . . subject to the yearly fee-farm rent of £30 9*s.* 2¾*d.*"

By deed poll dated 23rd December, 1851, the then Commissioners for the sale of Incumbered Estates in Ireland, for the

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consideration therein mentioned, granted to James Gilmore, and James Arthur Wall, the same premises to hold in fee, subject to the fee-farm grant of 16th November, 1847, and the clauses and conditions therein contained, and on the part of the grantor to be observed and performed.

By deed dated 15th June, 1853, James Gilmore and James Arthur Wall conveyed the same premises to Robert Getty in fee, subject to the lease of 25th September, 1806.

All the estate and interest of Robert Getty, who died in 1854, became vested in John Getty, and on his death, in 1874, in his trustees, now represented by the plaintiffs. The interest of John Busby in the lease of 1st May, 1826, became vested in the defendant Pascoe. In 1874 Mr. Cinnamond, who was then acting as solicitor for this defendant, applied to Mr. Torrens, the solicitor for the then trustees of John Getty's will, for a renewal lease. On 24th December of that year Mr. Torrens, the solicitor of the trustees, replied as follows:—"Dear Sir, If Mr. Pascoe is entitled to a renewal of a lease from Mr. Getty's trustee, I see nothing to prevent your furnishing your application in the usual way, accompanied by a statement of your client's title, and a draft of the deed he claims, leaving it to me to fill up the granting parties." Mr. Cinnamond then wrote asking for what term the trustees could renew; to which letter Mr. Torrens replied that he believed the trustees of Mr. Getty's will were seised in fee, but that he did not intend to look into their title until he was furnished with Mr. Pascoe's claim for a renewal of the lease. Subsequently Mr. Cinnamond furnished a statement of title, and a draft grant to Mr. Torrens, who, on 6th September, 1875, wrote as follows:—"The lease against Mr. Getty's trustees is that made on 25th September, 1806, by Thomas L. Stewart to Francis M'Cracken for ninety-four years, from 1st November, 1806. It contains no clause or covenant for renewal, and I must ask you to state on what grounds you allege the trustees of Mr. Getty's will are called on to make a renewal, founded on a sub-lease from Samuel M'Birney to John Busby."

Nothing further was done in the matter till the beginning of the year 1895, when some negotiation took place between the parties in reference to the matter, but no settlement was arrived at.

The plaintiffs received rent in respect of the premises from the defendant Pascoe, up to 1st May, 1896, and, in October, 1896, served a notice to quit the said premises, on 1st May, 1897, and on 19th May, 1897, issued a writ in the Queen's Bench Division, claiming possession of the premises and mesne rates. By order dated 26th February, 1898, the action was transferred to the Chancery Division, Master of the Rolls. The defendant Pascoe, who was in possession by himself and his undertenants of the premises, by his statement of defence, submitted that under the circumstances of the case he was entitled to retain possession of the premises in question, and counterclaimed for the specific performance of the covenant for renewal contained in the lease dated 1st May, 1826, from M'Birney to Busby, and asked that the plaintiffs might be ordered to execute a lease or grant of the premises for the term vested in them, on the undertaking of this defendant to make all payments and do all things prescribed by the said covenant on his part.

Ronan, Q.C. (with him *Stanley, Q.C.*, and *R. F. Harrison*), for the plaintiffs:—

The plaintiffs are entitled to recover possession of the premises demised by the lease of May 1st, 1826, and are not bound by any covenant for renewal.

The short question in the case is, whether the estate in fee-simple which was never owned by M'Birney, the covenantor in the lease of 1826, but was acquired by Robert Getty (through whom the plaintiffs claim) long subsequent to the time when he purchased the immediate reversion on the lease of 1826, is bound by the covenant for renewal contained in that lease. We submit it is not. In *Lytle* v. *Fox* (1), the estate that was held to be bound by the covenant to renew was an estate purchased by the covenantor himself, and not by an assignee. Here the estate, which it is sought to bind, never vested in the covenantor (M'Birney) at all. The Court of Appeal decided *Lytle* v. *Fox* (1), on the construction of the covenant in question, and on the ground of contract. At any rate there is no such equitable obligation existing here as the Vice-Chancellor held there was in that case.

(1) [1898] 1 Ir. Rep. 340, 355.

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The covenant for renewal, in the lease of 1826, only runs against the estate that the lessor had in the land; and there is here no privity of estate, and no personal liability to renew fixed on Getty, through whom plaintiffs claim. The estate in fee cannot be bound by reason of a covenant running with the mesne reversion: Lyne on Leases, pp. 124, 125, 127; *Duchess of Chandos* v. *Brownlow* (1). *Brereton* v. *Tuohey* (2) decides that a covenant for perpetual renewal entered into by a person possessed of a limited interest in lands, does not bind the estate beyond that interest; and therefore, if his assignee acquires the inheritance, it is not bound by the covenant. *Kent* v. *Stoney* (3) discusses that proposition from an equitable point of view.

(2) This covenant in the lease of 1826 is an ordinary *toties quoties* covenant for renewal. The use of the word "fine" shows this. The event, on the happening of which the covenant was to be carried into effect, has never arisen. There was no renewal ever obtained from the Marquis of Donegall.

(3) The defendant Pascoe is barred by *laches*. The right to renewal (if any) accrued in 1853: *Pilson* v. *Spratt* (4).

Gordon, *Q.C.*, and *Chambers* (with them *Matheson*, *Q.C.*), for the defendant Pascoe:—

On the construction of the covenant in the lease of 1826, M'Birney was bound to renew to Busby, not merely if he obtained a renewal of his own existing lease or a new lease of the premises, but if he should obtain "any further or other extended term or interest of any kind whatever." The use of the word "fine" does not alter the unambiguous meaning of the covenant. The defendant is entitled in the events that have happened to a grant in fee on terms, and what proportion of expenses and costs he is liable to pay can be settled by the Court. The very words of the covenant point to possible acquirement of an interest in some other way than by lease to the covenantor.

In *Brereton* v. *Tuohey* (2), there was no person who at any time had any equitable right of renewal after the expiration of the

(1) 2 Ridg. 345.
(2) 8 Ir. C. L. R. 190.
(3) 9 Ir. Ch. R. 249.
(4) 25 L. R. Ir. 5.

lease for two lives of the lands in question. That case was decided on the question of a covenant running with the land. Even admitting that in this case the covenant in the lease of 1826 ran only against the immediate reversion, *i.e.* the interest of M'Birney, under the lease of 1825, from Simms and M'Adam; that interest was not merely the term of years in the lease, but the term of years *plus* the covenant contained in the lease by which the lessors bound themselves to grant any extended interest which they themselves might obtain. Robert Getty acquired the interest of M'Birney in the lease of 1825; he became the representative of the covenantor in that lease; and when he acquired the fee, the fee in his hands was bound by the covenant. Whatever benefit Robert Getty got by the purchase of the reversion, he was bound to hold as trustee for Busby, and those claiming through him, to the extent of their interest. The doctrine of graft applies. It is the case of a reversion purchased by a person in a fiduciary capacity who is bound to carry out a covenant for renewal, and his purchase is a graft on his previous interest: *Wilmot* v. *Aylmer* (1); *Postlethwaite* v. *Lewthwaite* (2); *Evans* v. *Walshe* (3); *Gabbett* v. *Lawder* (4); *Lawder* v. *Blachford* (5); *Re Lord Ranelagh's Will* (6); *Trumper* v. *Trumper* (7); *Randall* v. *Russell* (8); *Hardman* v. *Johnson* (9).

Apart from any question of the lease of 1825, the covenant in the lease of 1826, to Busby, is not merely a *toties quoties* covenant for renewal, but binds any interest which the covenantor may subsequently acquire. The covenantor is now represented by the plaintiffs, who derive title from Robert Getty, and the fee in their hands is bound by the covenant. If this covenant bound any interest that Getty might acquire, on what principle can it be held that it does not bind his assignee? Robert Getty purchased the lands subject to the personal undertaking of M'Birney. He purchased, and was bound by the personal undertaking of M'Birney, and the plaintiffs are therefore bound. An estate is

(1) 5 Ir. Jur. (N. S.) 372.
(2) 2 J. & H. 237.
(3) 2 Sch. & Lef. 519.
(4) 11 L. R. Ir. 295.
(5) Beatty, 522.
(6) 26 Ch. D. 590.
(7) L. R. 14 Eq. 295.
(8) 3 Mer. 190, 196.
(9) *Ibid.* 347.

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granted out of which the contemplated renewal or extended term or interest can be granted, and that estate is bound both in the hands of the covenantor, and in the hands of his assignee who purchased subject to that burden. *Kent* v. *Stoney* (1) is distinguishable. This case turns on the terms of the covenant in the lease of 1826.

As regards *laches*, the terms of the covenant did not bind the lessee to renew at any particular time: *Pilson* v. *Spratt* (2) has no application, for there the right was attempted to be enforced twenty-five years after the lease in question had expired. We had at any time during the currency of the lease a right to renew. Substantially we are now seeking to enforce the covenant. Nothing has been done inconsistent with the right of renewal. The defendant is still in possession. In considering this matter a Court of equity always considers whether any real injury has been caused by delay. There has been none occasioned in this case.

Harrison in reply:—

Lytle v. *Fox* (3) was decided by the Court of Appeal on the ground that the execution of the further lease was a literal performance of the covenant so far as it could be performed: See judgment of Fitz Gibbon, L.J.

That case, however, is wholly different from the present, because there it was the covenantor who purchased the superior interest. There is not any principle in equity by which a limited liability to grant a renewal during a subsisting lease is to be enlarged so as to attach to the fee in the hands of a purchaser from the covenantor: *Kent* v. *Stoney* (1); *Brereton* v. *Tuohey* (4). In this case there is no personal liability to grant a renewal or new lease, and it is sought to bind the inheritance in the hands of an assignee of the covenantor by reason of a covenant running only against the immediate reversion which no longer exists—*Brereton* v. *Tuohey* (4) decides that this cannot be done.

As to *laches*. On the pleadings the onus is thrown on the de-

(1) 9 Ir. Ch. R. 249.
(2) 25 L. R. Ir. 5.
(3) [1898] 1 Ir. R. 355
(4) 8 Ir. C. L. R. 190.

fendant Pascoe of showing that there was no such *laches* on his part as to disentitle him to relief. The facts of the case prove *laches*. If there was any right under the covenant, it accrued in 1853. In 1875 there was correspondence about the matter and the claim was abandoned. The plaintiffs and their predecessors in title have been left in undisturbed possession under the reasonable belief that no legal right to renewal existed. Under such circumstances a Court of equity will not enforce a covenant for renewal. *Pilson* v. *Spratt* (1), which was the converse case of the present is authority for that proposition.

June 21.

The Master of the Rolls:—

The plaintiffs claim judgment against the defendants for possession of certain premises comprised in a lease of the 1st May, 1826, from one Samuel M'Birney to John Busby, for 70 years, from the 1st May, 1825. It is admitted that the defendants' only title is under Busby, and that the plaintiffs or some of them are entitled to the immediate reversion; and as the lease expired on the 1st May, 1895, the plaintiffs' title is *prima facie* established.

The defendants, however, say that the lease to Busby contained a covenant by M'Birney, the lessor, to renew; and so the question turns upon this latter contention, which the defendants have raised both in their defence and by way of counterclaim. In answer to the counterclaim, the plaintiffs deny that there is any subsisting right to renewal at all in the events which have happened, or any which binds the plaintiffs, and they, besides, rely on *laches* by the defendants as disentitling them now to raise the question.

The title to the lands is as follows:—By lease of the 1st October, 1804, the then Marquis of Donegall demised to Thomas Ludford Stewart the premises in question, with others, for two lives (since deceased) and the residue of a term of 99 years from the 1st May, 1804, which would expire on the 1st May, 1903. This lease contains no covenant for renewal.

By sub-lease of 25th September, 1806, Stewart demised to Francis M'Cracken part of the premises in the lease of 1804, for

(1) 25 L. R. Ir. 5.

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94 years, from the 1st November, 1806 (expiring on the 1st November, 1900) without any covenant for renewal. M'Cracken appears to have become bankrupt; and the interest in the lease of 1806 was assigned, on the 5th August, 1811, by his assignees to William Simms, James M'Cleery, and James M'Adam in consideration of £500; and the interest of James M'Cleery in the premises was, in 1812, conveyed by him to Simms and M'Adam. Up to this point there is no question of any agreement to renew.

By sub-lease of 29th April, 1825, Simms and M'Adam demised to Samuel M'Birney the premises in question, with others, to hold for 71 years from 1st May, 1825, at the yearly rent of £80. This term expired on the 1st May, 1896; and this lease did contain a covenant relating to renewal, which is in the words following:— "And the said William Simms and James M'Adam do hereby for themselves, their heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said Samuel M'Birney, his heirs, executors, administrators, and assigns, that they, the said William Simms and James M'Adam, their heirs, executors, administrators, and assigns, shall and will, from time to time, and at all times hereafter, give, grant and demise unto the said Samuel M'Birney, his heirs, executors, administrators, or assigns, on the said Samuel M'Birney, his heirs, executors, administrators, or assigns, paying the fair proportion of such renewal fine as shall be payable out of the said demised premises, with others, a renewal or new lease of such further or other term, time, or increased interest, whether for lives renewable or lives or years, or how otherwise soever, which they, the said William Simms and James M'Adam, their heirs, executors, administrators, or assigns, shall or may obtain, or be entitled to, of said premises from the Marquis of Donegall or other person or persons having the right, power, or authority to give or grant any such renewal or further increased interest of the same."

M'Birney, the sub-lessee of 1825, was the lessor in the defendants' lease (to Busby) in 1826, for 70 years, expiring, as I have said, 1st May, 1895. M'Birney had thus a reversion for a year. This lease to Busby contained a covenant by M'Birney, the lessor, in the following words:—"And the said Samuel M'Birney doth

hereby for himself, his heirs, executors, administrators, and assigns, covenant and promise and agree to and with the said John Busby, his heirs, executors, administrators, and assigns, that in case the said Samuel M'Birney, his heirs, executors, administrators, or assigns, shall or may at any time hereafter procure or obtain any renewal or new lease, or further or other extended term or interest of any kind whatsoever in and to the said premises, that then and in that case the said Samuel M'Birney, his heirs, executors, administrators, and assigns, shall and will, from time to time, and at all times hereafter, give and grant unto the said John Busby, his heirs, executors, administrators, or assigns, a renewal or new lease of said premises for such further and other term as he the said Samuel M'Birney, his heirs, executors, administrators, or assigns, may procure of the whole of said premises, upon the said John Busby, his heirs, executors, administrators, or assigns, first paying a full and fair proportion of such renewal fine and fines from time to time as the said Samuel M'Birney, his heirs, executors, administrators, and assigns, shall or may be obliged to pay, and all rent and arrears of rent due out of the premises hereby demised."

By deed of 23rd June, 1830, the estate and interest of Simms and M'Adam, under the lease of 1806 (Stewart to M'Cracken), was conveyed to Robert Getty in consideration of £1600, subject to performance of the covenants. The lease of 29th April, 1825, is not referred to.

By deed of 31st August, 1831, Samuel M'Birney, the lessee in the lease of 1825, assigned all his interest to John Getty in consideration of £150. John Getty was, and was expressed to be, a mere trustee for Robert Getty, whose money the £150 was. The *habendum* in this assignment is for the residue of the term of 71 years in the lease of 1825, and such further or extended term or terms as might be obtained of said premises pursuant to the covenant for renewal in said lease contained.

Thus Robert Getty from this date represented the estates both of lessor and lessee in the lease of 1825, but as to the latter his title was equitable only.

In 1829 the Marquis of Donegall made a lease to Thomas L. Stewart for lives renewable for ever of the premises comprised in

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the lease of 1806; and Stewart's interest having legally vested in one James A. Wall, the then Marquis of Donegall, on 16th November, 1847, granted the same premises to Wall in fee-farm.

By deed poll of the 23rd December, 1851, the Commissioners for the sale of Incumbered Estates conveyed to James B. Gilmore and James A. Wall the same premises to hold in fee, subject to the fee-farm grant of 16th November, 1847.

On the 15th June, 1853, Gilmore and Wall conveyed the same premises to Robert Getty in fee, subject to the lease of 1806.

Thus Robert Getty became owner in fee-simple, subject to the lease of 1806, which was subject to the lease of 1825, and he was also, as has been shown, himself entitled to the lessee's interest in the lease of 1806, and also in the lease of 1825. The plaintiffs' title has been deduced through Robert Getty, and they have whatever he had. All formal matters were admitted, including notice to quit to determine tenancy from year to year created by receipt of rent after the expiration of the lease.

The question then is, whether the plaintiffs, as representing Getty, are bound to give any and what effect in favour of the defendants to the covenant to renew, contained in the lease of 1826. That covenant bound the lease of 1825, as Simms and M'Adam, the lessors of 1825, had covenanted with M'Birney, the lessee, to renew to him. But Simms and M'Adam, holding under the lease to Stewart in 1806, had no covenant entitling them to any renewal. In other words M'Birney was bound to renew to Busby if he himself obtained a renewal; Simms and M'Adam were bound to renew to M'Birney if they obtained a renewal; but they had no right to any renewal from Stewart, and Stewart had no right to any renewal against Lord Donegall. Stewart, as matter of fact, did obtain from Lord Donegall a renewal (I use that word as a general term covering any interest included in the covenants). But Stewart or his assigns gave no renewal to Simms and M'Adam.

It is difficult to see how in this Court the covenant contained in the lease of 1825 could have been enforced after 1831, since Robert Getty, who owned the mesne reversion, was equitably the owner of the lessee's interest, and the covenant could not have been sued

upon by his trustee against himself, for John Getty was, as has been said, a dry trustee for Robert.

The case is put thus, however:—The covenant in the lease of 1826 is not an ordinary *toties quoties* covenant for renewal merely, but includes any interest which the lessor may subsequently acquire. The lessor M'Birney is now represented by the plaintiffs, and they also represent Robert Getty, who in 1853 acquired the fee. The covenant, therefore, binds the fee, and entitled the defendants to a grant in fee on terms. This was the way Mr. Chambers argued it, apart altogether from any question as to the lease of 1825. Mr. Gordon, while admitting that the covenant in the lease of 1826 ran only against the mesne reversion, *i.e.*, the interest in the lease of 1825, contended that that interest was not merely the term of years, but the term *plus* the covenant in that lease, and that when the fee was acquired by the representative of the lessor it fed the covenant.

For the reason I have stated, viz., the identity in equity of the lessor and lessee of 1825, when the estates came to Getty, there seems insurmountable difficulty in the way of accepting this contention. But apart from that consideration it has to be borne in mind that Robert Getty, who purchased these interests, never entered into any covenant for renewal. The obligation sought to be fastened on him, and those claiming through him, is by virtue of his being assignee, not by virtue of contract by him. When he purchased the fee in 1853 there is nothing to indicate that he was under any liability which did not previously bind the fee as to the estate he so acquired, and of course Lord Donegall was under no obligation whatever in respect of the lease of 1806, or that of 1825, or that of 1826, to renew to anybody. Why then should the plaintiffs be bound? The covenant ran with the immediate reversion on the lease of 1826, that is, the interest in the lease of 1825, but that interest has expired, and there is no personal covenant.

I am unable to distinguish the present case in principle from *Kent* v. *Stoney* (1), decided in 1859 by my predecessor, Mr. Cusack Smith. In that case a cause petition was filed for a renewal, as to part of the premises comprised in a lease of 25th

(1) 9 Ir. Ch. R. 249.

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March, 1788, pursuant to a covenant for perpetual renewal contained therein. The facts of the case so far as I need refer to them are stated by the Master of the Rolls at the commencement of his judgment. At p. 252 he says:—"William Hill, who was the lessor in the lease of 1788, and who entered into a covenant for perpetual renewal contained therein, was at the time of the execution of the said lease, seised of part of the premises thereby demised, for lives renewable for ever, under a lease of 1769, and was seised for lives, without any covenant for renewal, under a lease of 1772, of the residue of the premises demised by the said lease of 1788. The latter premises are the subject of this suit, and it was of course overlooked, when William Hill entered into the covenant for perpetual renewal contained in the lease of 1788, that he had only a determinable interest in the part of the premises which he held under the lease of 1772. Thomas Stoney, in the year 1793, purchased the estate and mesne reversion of William Hill in the premises held by him under the leases of 1769 and 1772; and Thomas Stoney, in 1802, acquired the fee, under the will of one Robert Johnston, who had become entitled thereto after the death of Thomas Johnston, who was lessor in the leases of 1769 and 1772. Thomas Stoney was thus seised of the mesne reversion, and also of the ultimate reversion in fee; and the mesne reversion, as to the lands demised for lives by the lease of 1772, expired by the fall of the surviving life, in the year 1808. Sadleir Stoney, the respondent, is entitled, under a deed of marriage settlement executed in 1819, to the fee-simple of the lands demised by the lease of 1772, having executed a disentailing deed; and the question in the cause is—whether Sadleir Stoney, who is under no personal liability in respect of the covenant for perpetual renewal contained in the lease of 1788, and who derives no property under the covenantor, can be compelled to carry into execution that covenant in respect to the portion of the lands in question, merely because he has acquired the fee, the covenant having been binding on him as owner of the mesne reversion which has expired, but not having been annexed to nor running with the reversion in fee?" At p. 261, he says:—"The petitioners contend that, the fee being vested in the respondent, Sadleir Stoney, he is bound by the covenant for perpetual renewal in the

lease of 1788. If William Hill had acquired the fee of the premises which he held under the lease of 1772, after having entered into the covenant for perpetual renewal contained in the lease of 1788, he might perhaps have been bound to carry such covenant into execution; and if he had been bound, his heir would probably have been bound also." He refers to Lord St. Leonards' work on Vendor and Purchaser, and continues:— "If William Hill had acquired the fee, I apprehend the covenant for perpetual renewal would not have been binding at law, as an interest passed by the lease of 1788. It is not, however, necessary to offer an opinion on that point. A Court of equity would perhaps have held William Hill bound by the covenant for perpetual renewal, if, after the lease of 1788, he had acquired the fee in the lands which he held under the determinable lease of 1772. Whether the covenant would have been binding upon him if he had acquired the fee, or whether the estate in fee in the hands of his heir, or of others deriving under William Hill, or by purchase, would have been bound by the covenant, it is not, however, necessary to decide, or offer any opinion upon. The question here is wholly different. Thomas Stoney became entitled, in 1793, to the interest in the leases of 1769 and 1772. So long as the lease of 1772 subsisted, he was bound by the covenant contained in the lease of 1788. If he had obtained a renewal of the lease of 1772, a question might perhaps have been raised. But he became entitled to the fee under the will of Robert Johnston, who was in no manner affected by the covenant in the lease of 1788: *Randall* v. *Russell* (1). I am quite unable to understand how a person bound by a covenant, merely by reason of its running with a mesne reversion, and under no personal liability whatever, is to have an estate in fee, which he may have purchased, and for which he may have paid the full value, affected by a covenant to which the fee was not liable in the hands of the vendor. The respondent claiming as a volunteer under Robert Johnston can make no difference. Robert Johnston could not have been sued at law or in equity on the covenant. On what principle was Thomas Stoney to be held liable on the covenant, although claiming as a volunteer under Robert Johnston,

(1) 3 Mer. 196–198.

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where Robert Johnston was not liable? I can discover no principle of equity, either in the artificial or natural sense of the term, on which the limited liability of Thomas Stoney to grant a renewal, so long as the lease of 1772 was subsisting, is to be enlarged, because he acquires the fee. At law, I apprehend, the covenant was at an end by the merger of the mesne reversion in the reversion in fee. A Court of equity, in many cases, relieves against merger, and would perhaps, during the subsistence of the lease of 1772, have enforced the covenant, notwithstanding the merger; but on what ground the Court of equity is to fasten a contract on the fee, under the circumstances of this case, I am unable to understand."

Brereton v. *Tuohey* (1), decided by the Court of Exchequer Chamber upon the same title, is also an authority in point; but *Kent* v. *Stoney* (2) was the decision of a Court of equity.

As to the defence of *laches* relied on by the plaintiffs in reply to the counterclaim, I can see no answer to it. If *laches* can, under any circumstances, defeat such a claim, I think it must do so here. If the defendants or their predecessors in title ever had a right to specific performance of the covenant, that right accrued in 1853, when the fee was acquired by Getty. The right (if any) was to a grant in fee; and, of course, there could be but one such grant. Possibly the lessee, even though knowing of the grant to Getty, might have postponed applying for *his* grant till near the end of his term; but he did not do so. In 1875, the then owner of the under lease made through his solicitor, the late Mr. Cinnamond, a formal application to the lessor's solicitor for a renewal or new grant; and Mr. Torrens declined entering on the subject till the basis was made quite regular by the usual financial preliminaries. He then wrote on the 6th September, 1875, to Mr. Cinnamond:—

As to Pascoe's Claim.

DEAR SIR,—The lease against Mr. Getty's trustees is that made on 25th September, 1806, by Thomas L. Stewart to Francis M'Cracken for ninety-four years from 1st November, 1806. It contains no clause or covenant for

(1) 8 Ir. C. L. R. 190. (2) 9 Ir. Ch. R. 249.

renewal; and I must ask you to state on what grounds you allege the trustees of Mr. Getty's will are called on to make a renewal founded on a sub-lease from Samuel M'Birney to John Busby.—Yours truly,

JAMES TORRENS.

To this letter no answer was given, and the matter so remained till 19th May, 1897, the date of the writ in the present action. No doubt the Gettys thought the matter was at an end nearly twenty-two years ago; and the property has been ever since looked upon and dealt with as free from any covenant obligation of this sort. It would be most inequitable to permit such a demand to be now made with success. Indeed, if the case be presented not as an equitable claim founded on fiduciary relation but as one based on contract, there might be ground for holding it barred by statute, notwithstanding that the covenant was to renew from time to time, and at all times thereafter: since in 1875 the lessee had notice that he could not get anything but a grant in fee, and that the right if it existed had accrued long since. It is enough to say, however, that the facts present a clear case of *laches*. It is true there is no proof that Getty or those who followed him incurred expense or the like on the faith of their title being free of the obligation in question: but they were left in undisturbed and undisputed possession during all these years, believing themselves to be under no such liability, and the property has been all along dealt with as if free from it. A claim of this sort, to the fee, ought to be put forward, if at all, at the earliest moment, especially as it involves (if well founded) correlative obligations as to payment and contribution.

Solicitors for the plaintiffs: *Torrens, Sons, & Bristowe.*
Solicitors for the defendant Pascoe: *L'Estrange & Brett.*

R. W. L.

M. R. 1898. May 13, 14. June 2.

GORRINGE *v.* THE LAND IMPROVEMENT SOCIETY.

(1897. No. 625.)

Land Improvement Act—Provisional Order for creation of rentcharge—Agreement to advance money for improvements—Action for breach of contract to pay instalments of loan—Specific performance.

A Land Improvement Society (duly incorporated for making advances) agreed to advance to the owner of an estate £4000 for improvements on his lands, on condition of having assigned to them a Provisional Order from the Board of Works, under the Act of 1864, sanctioning the proposed expenditure for improvements, and, subject to the requirements of the Act, creating a rentcharge on the estate.

The Board of Works sanctioned the loan, and the owner assigned the Provisional Order to the Society, who advanced to the owner £1500 on account of the loan by the specified instalments, but refused to make any further advances:—

Held, that the owner was entitled to specific performance of his contract with the Society, the transaction being in substance a purchase by the Society of a rentcharge to be created in part by means of the purchase-money to be paid for it.

ACTION.

By his statement of claim the plaintiff alleged that he is and was at the time of the contract thereinafter mentioned owner in fee free from incumbrances of the estate of Fintra, Killybegs, in the county of Donegal. That the defendant Company was a company incorporated under the 56 & 57 Vict. c. 39, for the purpose, amongst other things, of making loans to owners of estates in Ireland to enable them to effect permanent improvements upon such estates. That in the year 1895 he (the plaintiff) being desirous of carrying out certain improvements on his said estate of Fintra, applied to the defendant Company for a loan of £4000, to be expended in the execution of said improvements.

The statement of claim continued as follows:—

4. After some correspondence between the plaintiff and his land agent, Mr. Arthur Parsons Guy, on the one part, and the

defendants on the other part, it was agreed that if the plaintiff procured from the Commissioners of Public Works in Ireland a Provisional Order sanctioning the said proposed improvements, expressed in an application made by the plaintiff to the Commissioners of Public Works, and if the plaintiff assigned to the defendants the said Provisional Order (when procured), and if the plaintiff and his said land agent, Arthur Parsons Guy, gave to the defendants their joint and several bond to duly apply the said loan in carrying out the said improvements according to the plans and specifications sanctioned and approved of by the Commissioners of Public Works to the satisfaction of said Commissioners, and to account to the defendants for the due application of the moneys which should from time to time be advanced by the defendants under the said contract, the defendants would lend and advance to the plaintiff the sum of £4000 in convenient instalments of £400 as the works proceeded, to be repaid by the plaintiff by twenty-five annual instalments for principal and interest of £269 15*s*., the defendants, moreover, to be entitled to a commission of £5 per cent. on the amount advanced.

5. The plaintiff in pursuance of the said contract did procure the said Provisional Order from the said Commissioners of Public Works sanctioning the said proposed improvements at an expense not exceeding said sum of £4000, and did assign the said Provisional Order to the defendants (by Indenture dated 1st June, 1896), and the plaintiff and the said Arthur Parsons Guy did give to the defendants their joint and several bond (dated 1st June, 1896), conditioned as above mentioned, and approved of and accepted by the defendants, and all conditions were performed, and all things happened and were done, and all times elapsed necessary to entitle the plaintiff to the due performance of the said contract by the defendants.

6. In pursuance of the said contract the defendants advanced to the plaintiff the sum of £1500, which was duly expended by the plaintiff in carrying out the said improvements, according to said plans and specifications, and the plaintiff did account to the defendants for the due application of said money so advanced by the defendants, and the plaintiff was always ready and willing to carry out the said contract on his part, and to receive from the

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defendants the balance of the said sum of £4000, and to duly apply and account for the same according to said contract, and has in the carrying out of said improvements expended a large sum amounting to over £1000 in excess of the said sum of £1500 already advanced, yet the defendants have absolutely refused to make any further advances on foot of the said contract, until the said Commissioners of Public Works should make the said Provisional Order absolute in respect of the works already done, which the said Commissioners have declined to do until the entire works (specified in the Provisional Order) have been finished, or until such works have been finished as will yield an increased benefit exceeding the amount of the annuity involved by such works.

7. It was no part of the contract between plaintiff and defendants that it should be a condition of defendants completing the loan to the plaintiff that the said Commissioners of Public Works should make the said Provisional Order absolute in respect of a portion of said improvements as they progressed or were finished from time to time, and having regard to the nature of the improvements intended to be carried out, the requirement of the defendants in this respect was unreasonable, and the plaintiff believes was never put forward *bona fide*, but only as an excuse for refusing to carry out the contract.

8. In consequence of the defendants' refusal to advance further money, the plaintiff was obliged to discharge the workmen, and to sell off the plant and materials collected for carrying out the works, and owing to the works being left incomplete they have deteriorated in value. If it become necessary for the plaintiff to borrow the money required to complete the works elsewhere than from the defendants, the costs and expenses of such loan will be considerable. The plaintiff estimates that he has sustained damage to the amount of £1000.

The plaintiff claimed:—(1). That the defendants be ordered specifically to perform the said contract as stated in paragraph 4, and that an inquiry may be directed as to the loss sustained by the plaintiff by reason of the breach of the said contract on the assumption that the defendants will be decreed to carry out the contract. (2). In the event of the Court determining that by reason of the nature of the said contract a decree for specific per-

formance should not be pronounced, that the Court may declare that the plaintiff is entitled to full damages for breach of the said contract by the defendants, and that an inquiry may be directed as to what damage plaintiff has sustained, or will, or may sustain, by reason thereof.

Paragraph 3 of the statement of defence was as follows:—Admitting for the purposes of this defence, but no further or otherwise, that the defendants did contract as alleged in the 4th paragraph of the statement of claim, the defendants say that it was a condition precedent to the defendants' advancing any portion of the sum agreed to be advanced by the defendants that the plaintiff should well and truly account to the defendants from time to time for the expenditure of the moneys authorised to be expended by the Commissioners of Public Works in Ireland for the carrying out of the improvements sanctioned by the said Board on the plaintiff's estate, yet the plaintiff, though repeatedly called upon so to do, has never rendered any account of the said expenditure, but, on the contrary, has refused and still refuses to account; and the defendants say that in consequence of such refusal by the plaintiff, the defendants have been unable to obtain any charge or charges from time to time from the said Board under the provisions of section 49 of the Improvement of Land Act, 1864, according as various portions of the said improvements were completed, and in consequence the defendants have declined to advance more than £1500 to the plaintiff, unless and until the said accounts have been furnished by the plaintiff; and the defendants say that they have been released from the performance of the said contract by the plaintiff's refusal as aforesaid.

4. As a further defence to this action the defendants say that the said contract, if any, in the 4th paragraph of the statement of claim alleged was rescinded by the plaintiff's refusal to furnish the said accounts in the 3rd paragraph hereof mentioned.

5. The defendants, at the hearing of this action, will object that the plaintiff is not, on the facts in the statement of claim alleged, entitled to the relief in this action claimed or to any relief.

6. The defendants, as a further defence to this action, say that the plaintiff has, by his own acts, rendered the specific performance of the alleged contract impossible.

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7. The plaintiff has suffered no damage.

8. Defendants submit the action should be dismissed with costs.

9. In so far as the plaintiff seeks any relief by way of damages in this action, the defendants bring into Court the sum of £50, and say that sum is sufficient to satisfy the plaintiff's claim.

On the trial of the action the contract was admitted; and it was proved that £1500 was advanced to the plaintiff by the defendants from time to time, the whole of which sum and something more being expended by the plaintiff in carrying out his obligation under the contract. In February, 1897, the defendants refused to advance any further money without having the Provisional Order made absolute in respect of the improvements then completed. It was admitted that this demand was inconsistent with the terms of the contract, and the question was as to what was the plaintiff's remedy.

Evidence was given on behalf of the plaintiff that, in consequence of the breach of contract by the defendants, he had to dismiss workmen engaged on the works, and that there had been consequent delay in the completion of buildings, &c., and that he had incurred other expenses and costs.

Matheson, *Q.C.* (with him *Wylie*, *Q.C.*, and *Moriarty*), for the plaintiff:—

The plaintiff is entitled to specific performance of the agreement to advance £4000. This is not a case of a breach of contract to lend money merely. The Provisional Order gives a right to have a rentcharge on the estate under certain conditions; and it is the same thing as if the plaintiff had agreed to sell the right to have a rentcharge on his estate. What is ultimately sold is that rentcharge. A contract of that kind can be the subject of specific performance. Specific performance of agreements to execute mortgages have been decreed: *Ashton* v. *Corrigan* (1); *Hermann* v. *Hodges* (2); and this right to specific performance is one which can be enforced by either party to the contract.

Here the remedy at law is inadequate, and a Court of equity

(1) L. R. 13 Eq. 76. (2) L. R. 16 Eq. 18.

can grant specific performance. In *South African Territories Company (Limited)* v. *Wallington* (1) the facts were different from those of the present case. The plaintiff has suffered substantial damage in consequence of the breach of contract by the defendants.

Ronan, Q.C., O'Connor, Q.C., and *H. Wilson,* for the defendants:—

This contract is in substance nothing more than an agreement to lend money on security, and specific performance of such a contract is never granted, either at the suit of the borrower or of the lender. The only remedy is damages; and the measure of damages may be merely nominal: *Larios* v. *Bonany y Gurety* (2); *Western Wagon Company* v. *West* (3); *Rogers* v. *Challis* (4). In *South African Territories* v. *Wallington* (1), it was held that the obligation of a Company to issue mortgage bonds for a loan did not alter the nature of the transaction which amounted to a promise to lend money, and was consequently incapable of being specifically performed. That decision governs the present case.

The remedy of the plaintiff is damages merely. The measure of damages is the costs and expenses the plaintiff would have incurred in getting another loan. He ought to have raised money elsewhere on the breach by the defendants, and being a rich man with a large estate, he could easily have done so, and need not have suffered any loss at all. The damages should therefore be merely nominal. At any rate the £50 paid into Court is more than sufficient to compensate the plaintiff.

Wylie, Q.C., in reply:—

South African Territories v. *Wallington* (1) only decides that in that particular case there was nothing more than a contract to lend money. In such a case, of course, specific performance could not be granted. This contract was really a contract for the purchase of a rentcharge on the estate. There has been part performance of the contract, and the parties cannnot be restored to their original positions. Specific performance is the only adequate remedy.

(1) [1898] App. Cas. 309.
(2) L. R. 5 P. C. 346.
(3) [1892] 1 Ch. 271.
(4) 27 Beav. 175.

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1898.

GORRINGE v. LAND IMPROVEMENT SOCIETY.

June 2.

THE MASTER OF THE ROLLS:—

The plaintiff, a gentleman residing in England, is the owner in fee of the estate of Fintra, in county Donegal, on which he was desirous of effecting improvements at an outlay not exceeding £4000. In 1895 he conceived the idea of charging the money upon the lands under the provisions of the Improvement of Land Act, 1864 (27 & 28 Vict., c. 114). By that Act, sect. 25, it is provided that "If the Commissioners (the Board of Works) shall find that the proposed improvements or any part thereof, whether with or without any alterations by them required or sanctioned, would effect a permanent increase of the yearly value of the lands proposed to be improved, or of any part thereof, exceeding the yearly amount proposed to be charged thereon, they shall sanction such improvements, or such part thereof as they shall think expedient, if under the preceding sections it shall be lawful for them so to do, by an Order under their hands and seal; and they shall by the same Order fix the rate of interest to be allowed on the cost of the sanctioned improvements, having regard to the market value of money at the time, but such interest shall never exceed five *per cent. per annum*." The Order here referred to is the Provisional Order. Then section 26 provides—"The Commissioners shall from time to time prepare forms of Orders for sanctioning improvements, and shall also, whenever required by the landowner so to do, frame and entitle their said Orders under this Act in such manner that they may also be and operate as provisional, sanctioning, or other corresponding Orders under the respective Acts applying to any Company with which he may have contracted relating to the loan or improvements in question: Provided that every Order operating under this Act to sanction any improvements shall name the landowner to whom it is issued; shall express the greatest sum to be charged in addition to any costs, charges, and expenses under the fiftieth section hereof, and the rate of interest and term of years for the repayment thereof, the former not exceeding five *per cent. per annum*, and the latter not exceeding twenty-five years; shall specify the lands on which such repayment is to be charged; and shall either express or refer to some contract or other document expressing the general scheme of the improvements to be executed." And sect. 27 provides

"Every Order operating under this Act alone to sanction any improvement may be in the form set forth in Schedule (A) hereto, and shall be called a Provisional Order, and shall, subject to the following section hereof, create in favour of the landowner named therein the title to an absolute charge on the completion of the sanctioned improvements, which title such landowner may assign, either absolutely or by way of security, to any person; and such assignment may be made by endorsement on the Provisional Order." The 49th, 50th, and 51st sections provide for an absolute Order executing a charge on the completion of the works, or some part thereof, and the expenses of application and certain contracts may be included in the charge, the charges to be by way of rentcharge created by the absolute Order. Why Mr. Gorringe, who was, as I have said, owner in fee and not a limited owner, preferred to have recourse to the machinery of this Act, instead of raising the money by an ordinary mortgage, does not appear. The defendants' counsel say he is a rich man. I do not know how that is, nor does it affect the case.

The statutory rentcharge does not take effect (save provisionally) till the money is expended. Accordingly, as he wanted the money in the first instance, he applied to the defendant company, which is incorporated amongst other things for the purpose of making such advances, for an advance, to be repaid by means of rentcharge under Provisional Orders, and after some letter-writing (of which there is no lack in the case) the defendants agreed to advance not exceeding in all £4000, in sums of not less than £400 at a time, receiving 5 per cent. commission, and being entitled to an assignment of the Provisional Order. I do not mean to read the letters, because, owing to the course which the trial took, the existence of the contract was expressly admitted. A Provisional Order was, after great delay, obtained, dated 1st June, 1896. It is as follows:—"The Commissioners of Public Works in Ireland, in pursuance of 'The Improvement of Land Act, 1864, and the Settled Land Acts, 1882 to 1890,' do by this Order under their seal sanction the proposed improvements expressed in an application made by said Thomas James Hamilton Gorringe, upon the terms and conditions that such improvements be executed in the manner mentioned or specified in the second schedule hereto,

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and which schedule expresses the general scheme of the improvements to be executed, and at an expense not exceeding the sum of £4000, and do hereby declare and provisionally order that it is right and proper, and for the benefit of the parties interested in the lands mentioned in the first schedule hereto, that the inheritance or fee of such lands should be charged with the said sum of £4000, together with the costs, charges, and expenses, preparatory or in relation to and consequent on the said application, and that the same should, to the whole amount of such respective moneys, be charged in the manner following, that is to say, by way of annuity, after the rate of £6 14*s.* 11*d.* per centum, per annum, payable by equal half-yearly payments for the period of twenty-five years."

By instrument under seal, and bearing the same date (1st June, 1896), Mr. Gorringe assigned this Provisional Order to the defendants. It was part of the agreement for the advance that both Mr. Gorringe and Mr. Guy, his agent, should enter into a bond with the defendants for the due expenditure of the money, and they did so. Money to the extent of £1500 was actually advanced from time to time by the defendants, and there is no question but that the whole of it, and a good deal more, was duly expended by the plaintiff in exact conformity with his obligation; and so matters continued till 10th February, 1897, when the defendants insisted upon having an absolute Order from the Board of Works before making further advances (letter of February 10th, 1897). The effect of this would be, of course, that the plaintiff would have to provide the money himself in the first instance, instead of the defendants. It is admitted that they had no right to this, and that their requirement was inconsistent with their contract. Thus the contract is admitted, and its breach is admitted, and the only question is, what is the plaintiff's remedy? The plaintiff claims specific performance by the defendants of their agreement. The defendants say, No; the remedy is damages merely, and the £50 paid into Court is more than sufficient legally to compensate the plaintiff for his loss. They say that he could have had no difficulty in raising the money elsewhere, and he ought to have done so. Had he taken this course he need not have been put to any loss at all, and in short all that he can claim is nominal damages merely.

If I thought that the plaintiff's remedy was confined to damages there would have to be an inquiry, for I am clearly of opinion that the case is not one for nominal damages. See *Larios* v. *Antonio Bonany y Gurety* (1) on the question of damages.

The plaintiff has incurred much trouble, inconvenience, and delay, besides some costs, in consequence of the defendants' unjustifiable conduct. He had a number of workmen engaged at Fintra whom he had to dismiss, and whom it might not be easy to replace. He lost a whole season. If he had raised the money, as was suggested, from a bank, he would have raised it as a personal loan, and upon terms quite different from those on which the defendants bargained to provide it. If he desired, as he was entitled, to raise it on the same terms and in the same way as the defendants contracted to advance it, it is not shown who would have given it on those terms, nor at what outlay nor how soon. The defendants deliberately decided to break their agreement; and whatever amount the plaintiff could lawfully recover, I am quite clear it is idle to speak of it as a case for nominal damages. All the circumstances were within the defendants' knowledge.

But the real question is, is it a case for damages only, or is the plaintiff entitled, if he chooses, to specific performance of the contract?

The defendants say no. The contract is one for the loan of money, and that only, and this Court never specifically performs such a contract. As a general proposition it is correct to say that a mere agreement to lend money, even upon security, will not be specifically performed. If money is lent, the lender may call it in again, and therefore specific performance would be futile. Money compensation in such a case affords an adequate, and, indeed, the best remedy, and goes nearer to a complete *restitutio in integrum* than the enforcement of a loan which the lender might straightway proceed to require back, leaving the borrower in no better position after the interference of the Court. The very recent case of *South African Territories* (*Limited*) v. *Wallington* (2) was relied on as decisive of the case on this point. That was an action by a

(1) L. R. 5 P. C. 346. (2) [1898] App. Cas. 309.

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joint-stock company against a person who had agreed to take sixteen debentures, if allotted to him, and had paid a deposit of part of the amount, but after allotment refused to pay up the remaining instalments. The company claimed specific performance, and the House of Lords decided against the claim. Some of the points mainly argued in the case do not arise here, but the views of their Lordships' House on the question of specific performance have to be noted and regarded. At page 312 Lord Halsbury, C. says: "The applicant for debentures on the face of the instrument contracts to pay something, but the real nature of the whole transaction is an agreement by the applicant to lend money at certain interest, and the action in this case was in truth mainly, if not altogether, directed to compel the intending lender to perform his contract to lend, which undoubtedly he had refused and neglected to do. With respect to the claim for specific performance, a long and uniform course of decision has prevented the application of any such remedy, and I do not understand that any Court or any member of any Court has entertained a doubt but that the refusal of the learned Judge below to grant a decree for specific performance was perfectly right." To the same effect is the opinion of Lord Watson, stated at p. 314, and that of Lord Herschell (p. 315). And Lord MacNaghten says (p. 318): "It is quite plain that the contract made by the offer of these debentures, and the acceptance of that offer is nothing more or less than a contract to borrow and a contract to lend so much money payable by instalments. The essential character of the transaction is not altered either by the circumstance that the creditor in a certain event is to have the option of exchanging his position for that of a shareholder, or by the complicated nature of the arrangements made for the lender's security. That specific performance of a contract to lend money cannot be enforced is so well established, and obviously so wholesome a rule, that it would be idle to say a word about it." And Lord Morris states his concurrence at page 320.

These *dicta* do no more than state what the undoubted rule of law is. It must be a question in each case whether there are facts to which the rule can be applied. In Fry on Specific Performance the law is stated thus:—"Again, the Court will

specifically enforce a contract to execute a mortgage, and that even with an immediate power of sale where the money has been actually advanced either before or at the time of the contract; though it will not so enforce a mere agreement to lend, advance, or pay money (though the loan be one to be secured by mortgage), while it rests entirely unperformed either by the intended lender or by the intended borrower." And again: —"The Statute of Frauds does not apply to such a case. Therefore, if the Court has jurisdiction in such a case, any conversation may be made the subject of a suit for specific performance: thus if two friends are walking together and one says, 'will you lend me £100 at £5 per cent. for a year on good security?' and the other says, 'I will,' that conversation might be made the subject of a suit for specific performance in this Court if on the next day one friend should say, 'I do not want the money,' or the other should say, 'I will not lend it.' Nothing would be more difficult and more dangerous than the task which this Court would have to perform if it were to investigate cases of that description."

It will be observed that this is a guarded statement, and it will be found to be borne out by the cases cited. Take for instance *Rogers* v. *Challis* (1) in which the law is stated with great clearness by the Master of the Rolls. He says: "The case cannot be put higher than this:—that the defendant applies to the plaintiff for the loan of £1000 upon a security which he specifies, and the plaintiff assents to the proposal, but on the next day the defendant says, 'I have changed my mind, I do not require your £1000. I can get it upon better terms elsewhere.' Is that a case in which a person can come to this Court for a specific performance, and say 'you, the defendant, are bound to let me advance the £1000 to you—it is true your circumstances may be altered, but you are bound to let me advance the money to you'?" He then puts the the case quoted by Fry, L.J. in his book. He continues:—"This is not an agreement to purchase or sell anything, it is not the case of a contract to buy a particular debt upon certain terms, or a contract for the purchase of a certain quantity of goods, to be

(1) 27 Beav. 175.

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paid for by instalments and in a particular manner, in which case the Court has held, that these were circumstances which took the transaction out of the rule of this Court, that an ordinary contract for the sale or purchase of goods is not the proper subject of a suit for specific performance in this Court. It is nothing more than this:—a proposal to borrow a certain sum of money, upon certain terms, for a certain time, which is accepted, and the borrower says two or three days afterwards, I do not want the money, and I have got it elsewhere, upon better terms. It certainly is new to me that this Court has ever entertained jurisdiction in a case where the only personal obligation created is, that one person says, if you will lend me the money I will repay it and give you good security, and the terms are settled between them. The Court has said, that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said that the remedy here is inadequate or defective?"

Hermann v. *Hodges* (1) is no exception to the general rule: for there the plaintiff had advanced his money on a contract to have a mortgage, and a common law judgment instead might have been a very different remedy for its recovery.

I do not know of any case in which when there has been a substantial part performance so that the parties cannot be restored to their original position, the aid of the Court has been withheld.

But is the present case one of a mere contract to lend money? No doubt it is spoken of in the correspondence, and indeed for that matter in the plaintiff's pleading, as a loan; but that cannot shut out the consideration of what the real transaction was. The defendants were bound to advance money, which, when received by the plaintiff, was to be by him laid out in a specified manner in effecting certain defined and sanctioned improvements upon the lands. When completed these improvements must add to the value of the lands, and so provide part of the security for the advances which were to be repaid by a rentcharge, created by the Board of Works, and calculated so that principal and interest at 5 per cent.

(1) L. R. 16 Eq. 18.

would be wiped off in 25 years. The defendants were to become owners of the rentcharge. There was no covenant by the plaintiff, and no personal liability, to pay off the advances; and if there were any personal liability on the part of the plaintiff, it would at most be only in aid of or as security for the payment of the rentcharge. *Thomas* v. *Sylvester* (1) does not apply to this case. If there is anything plain it is that there was no loan in the ordinary sense. The defendants having advanced their £4000, and got their absolute order and rentcharge, would plainly have no right to go to the plaintiff and say, "Now pay back our £4000." The answer would be, "Your £4000 has been spent, as you contracted it should be spent, on the land. I cannot, therefore, repay it. But it adds £4000 to the value of the estate; and you are entitled to get payment, not now, but spread over 25 years; not from me, but out of the land." It is an abuse of language to call that a loan. The rentcharge was not to be a security to the defendants for an advance. It was to be their own sole and absolute property. This is in substance a purchase of a rentcharge to be created in part by means of the purchase money to be paid for it.

Now, will a common law action for damages afford an adequate remedy for the breach of this agreement? The Provisional Order sanctions expenditure to the extent of £4000. That Order has been transferred to and is at this moment vested in the defendants. No doubt it might be made part of a decree in this Court, that the defendants should retransfer this Provisional Order or so much of it as would enable the plaintiff to try to get the rest of the money elsewhere. But what would be the position then? He would have to find another purchaser of a second rentcharge, *puisne* to the first. Could he get that on the same terms? I think it is impossible to suppose that a *puisne* rentcharge would bring as good a price as a prior one, even if a purchaser could be found for it at all. And besides this, the plaintiff would lose the benefit of his advantageous contract whereby the defendants were to take his bond in lieu of inspections of the works, and to waive all investigation of his title. No one else might

(1) L. R. 8 Q. B. 368.

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be very easily and promptly found to make that arrangement; and inspections are very costly things, as the facts of this very case show.

I think that the defendants having proceeded so far with this bargain are bound to complete it. They cannot be permitted to say, we will stop short in the middle, having got the best part of the transaction: we will treat it as a contract to give us a rent-charge representing £1500; and you may go and look for someone to advance the £2500 remaining, on equally favourable terms, if you can find him. Had the plaintiff chosen to take a decree for damages, he would have been entitled to substantial and probably large damages. As he desires to have the contract carried out and completed, I think he is entitled to a decree on the ground that it would be inequitable to allow the defendants, under the circumstances proved, deliberately to violate their engagement by repudiating it in part while holding on to it so far as they considered it beneficial for themselves to do so, at the expense of plaintiff and his estate.

Solicitor for the plaintiff: *J. Loughrey.*
Solicitor for the defendants: *C. J. Rutherfoord.*

R. W. L.

RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS AND RATHMINES AND PEMBROKE MAIN DRAINAGE BOARD *v.* THE GUARDIANS OF THE POOR OF THE SOUTH DUBLIN UNION.

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(1898. No. 199.)

Public Health Act (Ireland), 1878, *ss.* 2, 15, 17, 21, 24—*Drains—Sewers—Vesting of sewers in sanitary authorities—Use by Sanitary Authorities of sewer in adjoining district*—40 & 41 *Vict. c.* lxxxii., *ss.* 41-46—*Injunction.*

The plaintiff Commissioners were the sanitary authority of the Rathmines and Rathgar township, and were, by the 40 & 41 Vict. c. 82, constituted with the Rathmines and Pembroke Main Drainage Board into a joint Board for the construction of certain main sewers, and amongst others a certain outfall sewer for the drainage *inter alia* of the plaintiff Commissioners' township. The Act contained express prohibition against the use of any sewer, authorised by it and under the control of the plaintiffs, by any sanitary authorities or persons outside the limits of the Rathmines and Rathgar and Pembroke townships, unless they obtained a licence for the purpose from the plaintiffs. In an adjoining district of which the defendants were the sanitary authority, two squares were laid out early in the year 1897, containing a considerable number of houses, for the drainage of which the proprietors constructed two drains respectively, which were connected with an old county drain, that passed along a road in the defendants' district, and was primarily constructed by the Grand Jury merely to carry off the surface water of the road. The county drain at a certain point met and entered the outfall sewer belonging to the plaintiffs, so that the sewage matter from the squares eventually passed into it. The defendants had not obtained any licence from the plaintiffs for this use of their outfall sewer, and accordingly the plaintiffs, on the 13th August, 1897, served a notice on them requiring them to disconnect the sewers belonging to them that were discharging sewage matter into their outfall sewer. The defendants replied that no sewer belonging to them entered the system of the plaintiffs save that used for many years for surface drainage.

The plaintiffs having brought an action to restrain the defendants from the acts complained of, or from any further acts that might be committed by them in the future whereby the sewage passing through the plaintiffs' system should be increased:—

Held, that the drains connecting the squares with the county drain, being common to more houses than one, fell within the definition of sewers contained

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in the Public Health (Ireland) Act, 1878, sect. 2, and, as such, once they were constructed, whether by the defendants themselves or other persons, became vested, by section 15, in the defendants as the sanitary authority of the district; that inasmuch as the sewage matter first passed through these sewers so vested in the defendants, it was immaterial whether it passed from them directly into the outfall sewer of the plaintiffs or indirectly through the medium of the county drain; and that consequently the plaintiffs were entitled to the relief sought for.

THE plaintiffs were the sanitary authorities of the Rathmines and Rathgar Townships, and the joint drainage board for the Rathmines and Pembroke districts, and the defendants were the sanitary authority of a district immediately adjoining the Rathmines and Rathgar Townships.

By an Act passed on the 12th July, 1877 (40 & 41 Vict. c. lxxxii.), called the Rathmines and Pembroke Main Drainage and Improvement Act, the plaintiffs were constituted a joint drainage board for the construction of certain main sewers, therein mentioned, and amongst others a certain outfall sewer for the better drainage of the Rathmines and Rathgar and Pembroke Townships.

By sect. 36, sub-s. 5 of the same Act, it was provided that the plaintiffs should pay to the Dublin Port and Docks Board a sum of £250 annually to repay all extra dredging expenses caused by the discharge of sewage matter from the outfall sewer into the river Liffey.

By sects. 41, 42, 43, 44, provision was made for the granting of licences by the plaintiffs to urban or rural sanitary authorities, or other persons outside the limits of the townships, for the use of sewers under their control, and for prohibiting such use, directly or indirectly, without an agreement with them.

Section 46 restricted the granting of the above-mentioned licences without the consent in writing of the Port and Docks Board.

The district, of which the defendants were the sanitary authority, adjoined the township of Rathmines and Rathgar at Terenure and Harold's Cross in the county of Dublin. An old county drain passed along the road, known as the Templeogue-road, through Terenure, and thence along the Harold's Cross-road, in the defendants' district, communicating with the outfall sewer

of the plaintiffs at the township boundary on the Harold's Cross-road. This county drain was never intended to be a sewer, but was merely constructed as a means of discharging the surface water of the road. It appeared that from time to time certain owners or occupiers of houses in this district, with the consent of the defendants, had connected their house drains with the county drain, so that the sewage matter from them was discharged into it, and thence into the plaintiffs' outfall sewer, but not in such excessive quantities as to be immediately perceptible, or to cause any substantial injury to the plaintiffs' outfall sewer. The plaintiffs at the time did not raise any objection to the acts of these persons, nor did they form any ground of complaint in the present proceedings.

Early, however, in the year 1897, building on an extensive scale was commenced on the Templeogue-road, and on the Harold's Cross-road, upon the latter of which two squares, called Kenilworth Park, and Mount Tallant, containing a large number of houses were laid out, and the owners of these houses, apparently with the knowledge of the defendants, and without any objection on their part, connected them by means of two drains respectively with the county drain, so that thereby a large amount of additional sewage matter was discharged into the outfall sewer of the plaintiffs.

The plaintiffs, being apprehensive lest the increased volume of sewage matter thus passing through their sewer might overtax its capacity, and cause serious injury to it, and fearing further serious injury from the opening up of the defendants' district for building purposes, served the following notice upon the defendants:—

To THE CLERK OF THE BOARD OF GUARDIANS,
SOUTH DUBLIN UNION.

SIR,—Take notice, that acting for the Rathmines and Rathgar Township Commissioners and the Rathmines and Pembroke Main Drainage Board, we hereby require the Guardians of the South Dublin Union, as the Sanitary Authority having control of the sewers in their districts, to disconnect the sewer or sewers at present discharging sewer water or sewer matter from Mr. Healy's or Dr. Barry's houses into the sewer of the Rathmines and Rathgar Township Commissioners at Harold's-cross, and to disconnect any sewer or sewers discharging such sewage water or matter into the sewers of the said

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Commissioners. And take notice, that in the event of the Guardians neglecting this notice, or if, after service thereof, such sewer water or sewage matter is allowed to find its way into the sewers of the Commissioners, they, the said Commissioners and Rathmines and Pembroke Drainage Board, will proceed by Writ of Injunction, or otherwise as they may be advised, to restrain the Guardians from the acts complained of.

Dated this 13th day of August, 1897.

D. & T. FITZGERALD,
Solicitors for the above-named parties,
20, St. Andrew-street, Dublin.

The defendants replied as follows :—

SOUTH DUBLIN UNION,
CLERK'S OFFICE, BOARD ROOM, JAMES'S-STREET,
19*th August*, 1897.

Re DRAINAGE HAROLD'S CROSS ROADS.

DEAR SIRS,—I am directed by the Board of Guardians of this Union, as the Sanitary Authority, to inform you that no sewer of the Sanitary Authority enters into the system you refer to, save that used for surface drainage for many years past.

Yours faithfully,

GEORGE WHITESIDE,
Assistant Clerk of Union.

Messrs. D. & T. FITZGERALD.

The defendants having failed to comply with the above-mentioned notice, the present action was instituted by the plaintiffs, in which an injunction was sought to restrain the defendants from causing or permitting any sewage matter from the houses erected during a period of twelve months previous to the issue of the writ, or from any houses that might be erected in the future from passing directly or indirectly into their sewers.

Campbell, Q.C., and *Blood* (with them *Drury*), for the plaintiffs :—

The defendants have adopted the ownership of the county drain, and it is clear that having allowed it to be used as a sewer, they are estopped from denying that it is a sewer. The two drains which connect the squares with the county drain, being common to

more houses than one, fall within the definition of sewers contained in the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52, s. 2), and consequently by sect. 15 of that Act they are vested in the defendants as the rural sanitary authority, upon whom is thrown the duty of keeping them in repair (sects. 17, 20, 21, 24). There are three exceptions contained in s. 15, the first of which is sewers made by a person for his own benefit, or by any Company for the profit of shareholders. But this refers to what is known as a sewage farm, and not to sewers in a town. The other two exceptions admittedly have no application to the present case.

Under analogously worded sections in the English Public Health, a number of cases have been decided which practically rule the present. Where a landowner makes a drain for the drainage of the houses on his property, such a drain comes within the definition of a sewer, and is not one made for his own profit, and vests at once in the urban sanitary authority: *Bonella* v. *The Twickenham Local Board of Health* (1); *Ferrand* v. *Hallas Land and Building Company* (2); *Kershaw* v. *Taylor* (3). No doubt the county drain was primarily constructed to carry off the surface water of the road. But the sanitary authority are in default, for as long as the drain is there the adjoining owners are entitled to drain into it, and cannot be prosecuted for doing so: *Molloy* v. *Gray* (4). Even where a drain is constructed merely to carry off surface water, if the sanitary authorities stand by and allow it to be used as a sewer it vests in them: *Falconar* v. *Corporation of South Shields* (5). Independently of a statutory enactment one sanitary authority cannot allow another sanitary authority to discharge sewage into their sewers without an agreement being entered into for the purpose: *Attorney-General* v. *Acton Local Board* (6); *Kingstown Commissioners* v. *Blackrock Commissioners* (7).

(1) 18 Q. B. D. 577; on appeal—20 Q. B. D. 63.
(2) [1893] 2 Q. B. 135.
(3) [1895] 2 Q. B. 208; on appeal—*Ibid.* 471.
(4) 24 L. R. Ir. 258.
(5) [1895] 2 T. L. R. 223.
(6) 22 Ch. D. 221.
(7) Ir. R. 10 Eq. 160.

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Matheson, Q.C., and *Rynd* (with them *O'Connor*, Q.C.), for the defendants:—

We submit that no sewer in our district, belonging to us, discharges sewage matter into the plaintiffs' sewer. The plaintiffs are endeavouring to fasten on us the acts of third persons. The county drain was constructed by the Grand Jury, who have maintained it up to the present. It never vested in us, drains belonging to the Grand Jury being expressly excepted by section 2 of the Public Health Act. It may have been wrong for the inhabitants of the squares to connect their drains with the county drain, but that cannot have the effect of vesting them in us. They are liable to be cut off by the Grand Jury. Section 17 of the Public Health Act merely provides a remedy for the inhabitants of a district where the sanitary authorities have failed to provide a proper system of drainage for them, and sect. 21 points out the mode of enforcing it. It has been decided under the corresponding section of the English Public Health Act that the only remedy under the Act is by a complaint to the Local Government Board: *Pasmore* v. *Ostwaldtwistle Urban District Council* (1). There may be a necessity for the guardians to make provision for the drainage of their district, but the plaintiffs are third parties, and cannot indirectly compel us to do so.

All the authorities cited on the other side were cases where the parties were the sanitary authorities on one side, and persons living in their district on the other, and where the sewers in question discharged directly into the sewage system provided by the sanitary authority. For the plaintiffs here to succeed, they must bring the defendants into privity with the acts complained of, at least by showing that sewers of the defendants communicate directly with those of the plaintiffs.

Blood, in reply.

Dec. 2.

THE VICE-CHANCELLOR:—

This is a case of considerable magnitude arising out of a contention between two important local bodies—the Rathmines Drainage Board, and the Guardians of the South Dublin Union

(1) [1898] App. Cas. 387.

as sanitary authority of an adjoining part of the same district. Their provinces are essentially distinct, for though the sanitary authority has the ownership of all the sewers in the district, there was still a want that could not be conveniently met save by the creation of another authority which is now represented by the plaintiffs. The necessity for it arose from this, that there was a great body of sewage-matter to be got rid of in this rapidly increasing and populous district, which could not be provided for by the powers conferred upon the sanitary authority. Plans were devised to carry away all this sewage-matter to the sea by a main outfall drain which would pass through the Pembroke Township, which was similarly circumstanced to the Rathmines Township in this respect. Accordingly, plans for the construction of an outfall-drain for the purpose of serving both these districts were adopted and authorised to be carried out by the Act of 1877, 40 & 41 Vict. c. lxxxii., by which a Drainage Board was constituted, to be elected from the Rathmines Township Commissioners and the Pembroke Township Commissioners, and which of course was empowered to raise money and levy rates for the purposes of paying for this great work which was for the benefit of all. They rightly obtained protection against the unpermitted use of the great sewer they were to construct, for sections 41–46 of the Act contain express prohibitions against any person outside the limits of their townships under any pretext making use of this outfall drain, except as a matter of agreement or arrangement with the Drainage Board in whom the sewer was vested. That was as fair a thing as could be, and this Board had a right to say "we have done all this, and are imposing rates for it on a very large district, and if you choose to come in and apply to us to obtain the benefit of our great work we are satisfied to allow it on fair terms. But the Act protects us from being obliged to do so except as a matter of contract." The plaintiffs may, or may not, enter into such a contract as they please, but it must always be a matter of fair and reasonable consideration between the local bodies concerned. It was plainly for the interest of the sanitary authority to co-operate as far as possible with the Drainage Board, and to take advantage of the permissive powers conferred on it by the Act by obtaining a license from the Drainage Board for the use of their outfall drain for the purpose of carrying

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out works, which from time to time became necessary, and will afterwards become more necessary in these two townships. Therefore we come to this, that the Board thus properly constituted cannot be interfered with, and that no use can be made of their work except by entering into such arrangement or agreement with them as I have already stated.

That being established, I have now to deal with the case so far as the defendants are concerned.

The defendants have power as the sanitary authority to make a drainage system for the whole or any portion of the property within the South Dublin Union. I speak under correction as to that, for there may be exceptional cases which I need not stop to consider. However, they are bound, and can be compelled to establish a system of drainage for the purpose of carrying away the sewage-matter of any portion of the district within their jurisdiction. As yet they have taken no step for this purpose in this district, and this populous locality would still be dependent upon what is considered an old-fashioned system of drainage, namely, by cesspools, which it is the object of modern Sanitary Acts of Parliament to get rid of. They have permitted things to go on in this way, although the necessity for action was daily increasing, and a large number of houses have been built which have been allowed to get rid of their sewage as best they can. But, at last, within the past year or two, there have been laid out two new public squares closely adjoining the main drain constructed by the plaintiffs. One of these squres is called Kenilworth Park, and, so far, contains twenty-six or more houses, requiring a system of drainage. The other is called Mount Tallant, which is a square at a short distance off, and further away from the outfall drain, where a number of houses have been similarly placed. The proprietors constructed sewers for the drainage of these places respectively, which are indicated by yellow lines on the map which has been made an exhibit of.

In the first place we have to consider whether these works represented by the yellow lines are to be considered sewers or drains within the meaning of the Act. I think it is impossible to consider them drains, for it is clear from the language of the Act, and, if anything was required to make it clear, from the

authorities which have been cited, that a method of getting rid of sewage matter which is common to more houses than one constitutes a sewer, whereas a drain is defined to be that which carries off sewage matter from one house only. In the present case a large number of houses are served by these drains, and therefore there can be no doubt whatever that they are sewers within the meaning of the Public Health Act, and have become vested by sect. 15 in the sanitary authority of the district. [His Lordship read the section.] It is admitted that the three exceptions here mentioned do not apply to the case now in question. The only case that might have been attempted in argument before the authorities were decided was, that this might be considered to be a matter of profit, but it has been held that this is not a matter of profit within the meaning of the Act, and therefore we are rid of that question. The other two exceptions cannot apply at all to the present case, and therefore we must take it that these works, marked yellow on the map, are vested in the defendants as the sanitary authority of the district, who were bound to get rid of the drainage matter as best they could. But instead of devising any plan which might have embodied in it an arrangement with the plaintiffs as owners of the outfall drain, they devised a plan which was more ingenious than fair, and that was to try to cut off these drains from *direct* communication with this outfall drain, but in reality still to discharge into it. To do that in the case of Kenilworth Park, they had to run it so fine that instead of constructing the sewer straight down, which would have had the effect of bringing it directly into the outfall drain, they diverted it a little so as to pass into an old county drain which existed there for many years, and which came down to and met at a particular point the outfall drain of the plaintiffs. It must be borne in mind that this county drain was never made for the purpose of carrying away sewage matter. It was never intended to be a sewer, and it was utterly unfit from its construction to be a sewer. It was not of sufficient depth or constructed to serve any purpose except to carry off the surface matter of the road. Well, the defendants ran these sewers into this county drain which runs down and meets the outfall drain of the plaintiffs a little below, so that whatever sewage matter passes from Mount Tallant and Kenil-

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RATHMINES, &c., COMMRS. & DRAINAGE BOARD v. GUARDIANS, S. D. UNION.

worth Park into the county drain is carried through it into the outfall drain belonging to the plaintiffs, without there being any arrangement or agreement for the purpose, and in direct violation of the prohibitions contained in the Act of Parliament.

But, then, it is said by the defendants that they are not liable for this going into the plaintiffs' outfall drain, because they did not put it into it, as it does not go direct from their drain into the plaintiffs, and goes into the county drain for a few feet in one case, and some yards in the other, but I cannot conceive what difference that makes; for whatever it goes through to get into the plaintiffs' outfall drain, it comes from these sewers that are vested in the defendants as the sanitary authority. Then they turn round and say:—"It is the Grand Jury that are to blame, because we put our sewers into their county drain, and through that means it runs into your outfall drain." But I do not think it makes the slightest difference how many places it goes through. Suppose it was an open channel or the bed of a stream—no matter what. If it turns into the plaintiffs' drain in a state of sewage, it would be in my opinion a violation of the prohibitions of the Act of Parliament, and it would be making use of the plaintiffs' drain for the purpose of carrying off from the houses the sewage which the defendants are bound to find a means of carrying off in some lawful way.

On these grounds I am of opinion that an injunction must go against the defendants. The case has been very fairly conducted on both sides, and everything has been said for the defendants that could be said, but still I feel compelled to arrive at the conclusion that the plaintiffs are entitled to the relief sought for. The plaintiffs desire to confine the injunction to houses which have been built since the service of the notice stating their intention to interfere in this matter. This notice was served in 1897, about a year before the commencement of this action. They are satisfied to vindicate their rights for the future, and it is of the utmost importance that they should do so, because this main drain does most valuable service to the whole of that district, and if it became over-burdened, and if the plaintiffs did not come in and put a stop to this practice of persons arbitrarily putting sewage into it, it would lead to an overloading of their drain, and

defeat the purpose for which it was made, and besides might bring them into conflict with the Port and Docks Board, who are entitled under the Act, and are bound, to protect the channel and bed of the Liffey from being interfered with by any unnecessary and improper discharge of sewage matter, which would affect or interfere with it.

I shall, therefore, grant a perpetual injunction, and I must make the defendants pay the costs.

Solicitors for the plaintiffs: *D. & T. Fitz Gerald.*
Solicitor for the defendants: *G. R. Fitzgerald.*

J. MAC M.

IN THE MATTER OF THE ESTATE OF JOHN SOUTHCOTE MANSERGH, OWNER; SYLVANUS PIM, PETITIONER.

Ross, J. 1898. Nov. 14, 15. Dec. 13.

Power—Appointment—Settlement containing no hotchpot clause—Assignment of share which object of power would be entitled to, in default of appointment—Release of, and subsequent exercise of, power.

By a settlement, dated in 1822, and executed upon the marriage of R. M. S. M. and J. B., a term of 1000 years was created in trust to raise £10,000 for younger children of the marriage, in such shares as R. M. S. M. should by deed or will appoint, and in default of appointment to be equally divided among them, the sons taking a vested interest at twenty-one and the daughters at twenty-one or marriage. The settlement contained a declaration that if R. M. S. M. should advance any money or other property towards the provision or advancement in life of any of the younger children, such should be accounted in full or in part of such portion, and R. M. S. M. should have full power to appoint such sum or sums to such persons as he should think fit. The settlement did not contain any hotchpot clause. There were four younger children of the marriage, all of whom attained twenty-one, namely, R. St. G. M., M. A. N., R. M. (who died intestate and unmarried in 1869), and J. R. L. By a deed of the 4th August, 1858, £2500 was appointed to R. St. G. M., and by a deed of the 14th September, 1865, £2500 was appointed to M. A. N., who was thereby excluded from any further participation in the fund. By a deed of the 17th September, 1870, reciting only the appointment to M. A. N., R. M. S. M., as personal representative of R. M., assigned to J. T. P. the sum of £2500 to which R. M. was entitled, and R. M. S. M. and his eldest son covenanted to pay interest thereon. The deed contained covenants for title and further

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assurance by R. M. S. M., and also a release by R. M. S. M. of £7500, the unappointed (as therein stated) portion of the £10,000, from the power of appointment. On the 1st November, 1871, R. M. S. M. appointed to R. St. G. M. £2494, of which R. St. G. M. on the 12th May, 1877, declared a trust for J. R. L. By his will R. M. S. M. appointed £5 to J. R. L.:—

Held, that the residue unappointed at the death of R. M. S. M. was divisible among the personal representatives of R. M. S. M. (as personal representative of R. M.), R. St. G. M. and J. R. L., and that what passed under the assignment to J. T. P. was only one-third of this residue.

Held, further, that the covenants for title and further assurance would not extend to include in J. T. P.'s security anything which R. M. S. M. might have acquired through advancements, or otherwise than as personal representative of R. M.

THIS case came on upon an objection by Mrs. Sophia Elizabeth Mansergh to the final schedule of incumbrances. The facts are fully stated in the judgment.

Price, Q.C. (with him *C. W. R. Brady*), for the objector:—

The assignment to Mr. Pim only catches the one-third of the unappointed sum, that is, one-third of £2501 (Irish), as there is no hotchpot clause. Vaizey on Settlements, pp. 1220, 1221. Farwell on Powers, p. 367. The fact that interest was paid on the sum of £2500 makes no difference, as R. M. S. Mansergh and J. S. Mansergh, his eldest son, were bound under the deed of 17th September, 1870, to pay it. There is no evidence of advancements within the meaning of the clause in the settlement of 23rd February, 1822, and the payment of interest under the marriage settlement of 4th August, 1858, was only in the nature of an allowance, and different from the cases in Lewin, 9th ed., p. 662. Mr. Pim may have a remedy against the representatives of R. M. S. Mansergh, under the covenants for title in the deed of 17th September, 1870.

Ronan, Q.C. and *Ignatius O'Brien*, for Mr. Sylvanus Pim:—

Whether under general power or otherwise, R. M. S. Mansergh had power to assign what he took Mr. Pim's money for, no question of intention arises, but the law will make him perform his contract: *Blake* v. *Marnell* (1); *L'Estrange* v. *L'Estrange* (2). We rely on

(1) 2 Ba. & B. 35, 38. (2) 25 L. R. Ir. 399, 409.

advancements: *Taylor* v. *Taylor* (1); Williams on Executors, p. 1373. See Stroud's Judicial Dictionary for definition of Advancement. The annuity is an advancement, to be brought into hotchpot. Under the circumstances R. M. S. Mansergh had a general power of appointment over more than what was the difference between what Mr. Pim paid for the £2500—*i.e.*, £2283 sterling—and what would come to him if the objector's claim is correct. The Court can remedy a defective execution: *Minchin* v. *Minchin* (2). Even if we cannot prove advancements, we can require the executors of R. M. S. Mansergh to convey to us the portion which we have not got. That is a debt due by them, and we ask to have their share retained in Court to meet our claim under the covenant for further assurance. The clause in Mr. Pim's deed, releasing the power of appointment, indicates an intention that Mr. Pim should have all he could get out of the £10,000, and we submit that this, coupled with the conveyance of the £2500, will enable equity to catch what R. M. S. Mansergh's executors would be entitled to. The objector's husband took under the will of his father, R. M. S. Mansergh, and knew that he had secured Mr. Pim, and did not interfere. This was a confirmation of the assignment to Mr. Pim. We do not press it beyond an election: Swinburne, vol. i., p. 336.

C. W. R. Brady, in reply:—

The question is, was the option to acquire the funds exercised by R. M. S. Mansergh? The answer could only be found in Richard St. George's marriage settlement, and in the assignment to Mr. Pim. As to the marriage settlement no such intention appears therein, and what was assigned by the deed of 17th of September, 1870, was merely the share of Robert Mansergh. The granting of the annuity to Richard St. G. Mansergh is evidence that R. M. S. Mansergh did not intend to claim for the alleged advancements, and it is an implied release of the further power of acquiring any part of the funds going to Richard St. G. Mansergh: *Minchin* v. *Minchin* (2) at page 273; *Blake* v. *Marnell* (3) at page 39. The cases referred to in Williams on Executors have no

(1) L. R. 20 Eq. 155. (2) Ir. R. 5 Eq. 178, 258. (3) 2 Ba. & B. 35.

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application to a settlement. We do not admit that the special power of acquiring the fund is a general power. The creditor cannot ask the Court to retain funds here, which are otherwise payable to the objector.

Dec. 13.

Ross, J. :—

This is an objection filed on behalf of Mrs. S. E. Mansergh. She is the executrix of the late Richard St. George Mansergh. She objects to the charge of Sylvanus Pim which appears on the schedule, and contends that he is not entitled to the sum of £2307 13*s.* 10*d.*, but to a lesser sum.

It appears that by a settlement executed on 23rd February, 1822, on the marriage of Richard Martin Southcote Mansergh with Miss Jane Bomford, a term of 1000 years was created in trust to raise a sum of £10,000 for younger children, to become payable, and to become a vested interest, as Richard M. S. Mansergh should by deed or will appoint; in default of appointment the £10,000 was to be equally divided among them, the sons taking a vested interest at twenty-one, and the daughters at twenty-one, or marriage. The deed contained no hotchpot clause. There were four younger children of the marriage who all attained the age of twenty-one, namely :—1. Richard St. George Mansergh, husband of the objector; 2, Maria Annette, who married Dr. Nadin; 3, Robert, who died intestate, and unmarried, on 29th May, 1869; and 4, Jane Rosetta, who married Mr. William Lane. Each of these four became entitled to £2500, subject to divesting by an exercise of the power of appointment. By deed of 4th August, 1858, £2500 was appointed to Richard St. George Mansergh. By deed of 14th September, 1865, a further sum of £2500 was appointed to Mrs. Nadin; and by this deed she was excluded from further participation in this fund. On 17th September, 1870, a deed of assignment was executed by Richard Martin Southcote Mansergh to John Thacker Pim under whom the present Sylvanus Pim now claims, of the share to which Robert Mansergh was entitled. On 1st November, 1871, R. M. Southcote Mansergh appointed to his son Richard St. George Mansergh £2494 late currency. By deed-poll of 12th May, 1877, Richard St. George Mansergh declared that he held the said sum in trust for his sister

Jane Rosetta Lane. By his will dated 2nd November, 1871, R. M. S. Mansergh appointed £5 late currency to Mrs. Lane. A sum of £2501 is thus left unappointed. This sum the objector claims to be divisible among three, namely, Richard St. George Mansergh, her husband; Robert, through whom Sylvanus Pim claims: and Mrs. Lane; each being entitled to £769 10*s.* 9*d.* present currency.

The law is well settled that where there is no hotchpot clause in a settlement, and there is a trust for the benefit of a class in such proportions as the donee of the power shall appoint, and in default of appointment for the members of the class equally, if the donee of the power appoint part of the fund to one member of the class, and leave the residue unappointed, that residue is divisible among all the members of the class including the one to whom an appointment has been made (Vaizey, p. 1221). It has been pointed out that the settlement contains a proviso that not more than £2500 shall go by survivorship to any one child. It is contended that as Richard St. George Mansergh took £2500 under the deed of 4th August, 1858, and £2494 under the deed of 1st November, 1871, he can no longer participate in the unappointed residue. I am satisfied that the last-mentioned £2494 was not taken by the said Richard St. George Mansergh for his own benefit, but merely as trustee for his sister Mrs. Lane. In the next place it is contended that the settlement contained a proviso that should the said Richard Martin S. Mansergh in his lifetime or by his will give or advance any moneys or other property towards the advancement in life of his younger children, &c., then the moneys so advanced, if greater or equal to the fortunes provided for such younger children, should be accounted in full of the portion of the child for whose benefit such moneys should have been paid or given; but if the sums or property so advanced be less than the portions provided or intended for such younger children, then the same shall be accounted as part of the portions of such younger children, respectively; and in either of such cases the said Richard M. S. Mansergh shall have full power to appoint such sums as he had so advanced for such purposes to be paid to such person or persons as he might think proper, out of the portions provided for his younger children, and should be raised for that purpose unless

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the said Richard M. S. Mansergh should otherwise direct in writing. An attempt is then made to prove that Richard Martin S. Mansergh made advances to his son Richard St. George Mansergh far in excess of any claim he might have as a younger child under the trusts of the settlement of 23rd February, 1822. It is contended that by a lease made to Richard St. George Mansergh in the year 1857, of the demesne of Grenane, the lands were demised at an undervalue. The lease is made in pursuance of the leasing power contained in the settlement, but there is no evidence before me to show that the lands were let at an undervalue. In the course of the argument it was admitted by Mr. Ronan for the mortgagee that certain sums appointed by Richard Martin Southcote Mansergh to his son could not be contended to be advancements; an alleged advancement in the shape of stock and farming implements fails for want of evidence.

The only remaining thing to support the contention of advancement is that, in the settlement of the 4th August, 1858, on the marriage of Richard St. George Mansergh, his father covenanted during his life to pay to the trustees of the settlement interest on £2000 portion of the sums appointed at the rate of £5 per cent. per annum, for the benefit of Richard St. George Mansergh during his life. In pursuance of this covenant Richard Martin Southcote Mansergh paid £100 per annum for a period of seventeen and a-half years up the 24th March, 1876, when he died, making in all £1750. As the £2000 did not carry interest, it is contended that the payments of £100 per annum constitute an advancement. On the other hand it is contended that maintenance is one thing, and that advancement is another. There can be no advancement except in cases where money or other property is put to a specific use, namely, the settlement in life, as distinguished from the temporary assistance or maintenance, of the party in whose favour the property is thus dealt with. I do not find it necessary to decide this matter. It would be impossible to do so satisfactorily on the evidence before me.

The main question turns on what passed under the assignment of 17th of September, 1870. John Southcote Mansergh, the eldest son of Richard M. S. Mansergh, is a party to it. It recites that Robert Mansergh attained the age of twenty-one years in 1849;

that he died in 1869, intestate, unmarried, and without issue, leaving his father Richard Martin Southcote Mansergh his sole next-of-kin, who became his personal representative. The deed goes on to recite the appointment of £2500 to Mrs. Nadin, but makes no mention of the earlier appointment, and contains the false statement that the residue of the £10,000, that is £7500, was unappointed. It further recites that Robert Mansergh was entitled to £2500, portion of the £10,000, subject to any appointment that Richard Martin Southcote Mansergh might make, which sum, subject to such appointment, is stated to belong to Richard Martin Southcote Mansergh. In the operative part of the deed what is assigned is £2500, portion of the said sum of £10,000, to which Robert Mansergh was entitled, and to which Richard Martin Southcote Mansergh became entitled as his personal representative. There is a joint covenant on the part of Richard Martin Southcote Mansergh, and John Mansergh, to pay interest on the £2500 at 6 per cent. There is a covenant that Richard Martin Southcote Mansergh has full power to assign, and for further assurance. There is a release of the residue from the power of appointment, in order that the residue may devolve as in default of appointment. The last-mentioned covenant was subsequently broken by the appointment to Mrs. Lane, to which I have previously referred. The validity of the appointment to Mrs. Lane is not challenged by anybody in the present proceedings.

Turning to the mortgage of 1870, is there anything more conveyed than the share of the deceased son Robert? It is falsely stated in the deed to be £2500, but neither in the recitals nor in the operative part is there a word to show that anything passed by the deed except Robert's share, to which his father had become entitled. That being so, whether the father had purchased part of the £10,000 by advances seems to me immaterial. It is to be remembered that this is a contract for valuable consideration, and stands on a very different footing from a voluntary instrument. In the latter case we have merely to construe the words of the document in order to discover the intention—unless the intention is clearly indicated the property does not pass, as nothing will be presumed in favour of the volunteer. In the case of the contract

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for value the granting party is, in the words of Lord Redesdale, "understood in equity to engage with the person whom he deals with to make the instrument as effectual as he has power to make it." This doctrine is not to be carried too far. Every power that is in him will be called in aid to make good and valid the conveyance of the specific property which he has represented himself as conveying. But no case has gone so far as to indicate that other property, which the instrument does not purport to convey, shall be deemed to pass with the property specifically mentioned. If in this case after the assignment of the son's share there were any general words referring to any interest the father might have in the whole fund to be appointed, my opinion would be the other way. This is not a matter of a technical mistake in a deed. Before the mind of vendor and purchaser there was no interest to be dealt with but the interest of Robert Mansergh in the fund. The subject-matter of the contract was this interest alone and no other interest. The fact that the amount of that interest was grossly misrepresented is immaterial. Cases where equity aids a defective execution of a power have no application, neither have cases where the Courts have given effect to a general intention expressed in a deed which provided no adequate machinery. Here the only thing that is expressed to pass by the deed was the share of the deceased son.

The covenant for further assurance cannot have the effect of bringing in a new subject-matter in addition to what is expressed to pass by the deed. I quite appreciate Mr. O'Brien's ingenious argument to the effect that one might infer a general intention to assign £2500, part of the £10,000, from the existence of the covenant for further assurance, coupled with the attempted release of the power to appoint the residue of the fund. The covenant for further assurance binds the assignor to make good the title to what he may have ineffectually attempted to assign. The covenant not to exercise the power of appointment is an attempt to liberate the share of Robert which had passed, from the risk of divesting. From these covenants I can infer no such intention. The fact that interest has been paid on the sum of £2500 for so many years has no bearing on the case. In the mortgage deed both father and son covenanted to pay such interest.

I must, therefore, decide in favour of the objector, and remodel the schedule accordingly.

Although the objector does, in a sense, succeed under a title paramount, I cannot help thinking that her success does not accord with what is honest and right. At the same time it is better that occasionally individuals should suffer wrong rather than that violence should be done to the settled principles of law. In order to redress the wrong, so far as I legally can, I shall give Mr. Pim an opportunity of immediately proceeding against the representative of Richard Martin Southcote Mansergh in any form of action he is advised, and I shall retain in this Court for a reasonable time his assets, or any other property over which he had a general power of appointment.

Solicitors for the objector: *Baker & Ringwood.*
Solicitors for the petitioner: *John L. Scallan & Co.*

W. C. S.

V.-C.
1898.
April 21, 30.

Appeal.
June 20.

DRIMMIE *v.* DAVIES.

(1897. No. 902.)

Covenant to pay annuity to third party—Action by third party and personal representative of covenantee—Right to enforce covenant.

By deed made between A and B, A, who carried on business as a dentist, and B his son agreed to become partners as dentists for five years; a valuation was to be made of the furniture, instruments, &c., the property of A upon the premises where he carried on business; in the event of a dissolution B was to have the right to purchase that property at the amount of the valuation; and in the event of the death of A during the continuance of the partnership, B agreed to pay to his brothers and sisters certain annuities. A died within the five years, and B exercised his right of purchase.

In an action brought by the executors of A, and B's brothers and sisters, against B, to enforce payment of the annuities:—

Held, that the plaintiffs were entitled to maintain the action.

ACTION.

By deed of partnership dated the 26th June, 1895, and made between Frederick David Davies, Dental Surgeon, therein called the senior partner, of the one part, and Frederick Edward Davies, therein called the junior partner, of the other part, the said parties agreed to become partners in the profession of dentists for five years, from the 1st April, 1895, the business to be carried on at 27, Westmoreland-street, Dublin. The deed provided for the opening of a partnership bank account, and the lodgment to that account of moneys received which should form the floating capital of the firm; that all stock, implements, and instruments in trade, purchased out of the partnership funds should belong to the partners equally, and that all profits should belong to, and drawings be made by, the partners in the proportions of two-third parts to and by the senior partner, and one-third part to and by the junior partner: that on the expiration or determination (other than by death) of the partnership, the stock, implements, and trade

appliances should belong to each partner equally, and the cash and goodwill to them in the proportions aforesaid: and that in the event of the death of either partner, the partnership assets and goodwill were to be governed as was thereafter agreed. By clause 14, after reciting that the senior partner had carried on the business of dentist at 27, Westmoreland-street, on his own account, and had a quantity of furniture, fixtures, fittings, instruments, appliances, and other things, his property, upon the premises at the commencement of the partnership, it was agreed that a valuation thereof should be made, and that the senior partner should give the junior partner a right to purchase for cash at one-half the amount of said valuation, the one-half absolute share in said property at any time; and in the event of a dissolution whereupon the junior partner might happen to remain in the business, and the senior partner retire, then the junior partner was to have the absolute right of purchasing the one-half or the whole at the price set out in the valuation.

Clause 15 was as follows:—"In the event of the death of the senior partner while the partnership still continues, the said junior partner hereby agrees to pay to each of the three daughters of the senior partner, viz. Adeline Davies, Florence Davies, and Zillah Davies, a yearly sum of £40 for a period of seven years from said death; but should each or any of said daughters be married or settled in life prior to said death, or within seven years subsequently, then the liability of said junior partner to each or any of said daughters so settled shall immediately cease, and in no event is he to be bound to pay any sum whatever after the period of seven years, from date of death of senior partner; and said junior partner likewise binds himself to pay to each of his brothers Reginald and Athol Davies, from the death of the said senior partner, should this partnership then exist, a sum of £15 a-year each, till each respectively attains his majority, but in no event is he to be liable to either for a period of more than seven years from said death, the junior partner agreeing to make all said payments quarterly, commencing from date of said death, and in due succession." The deed also provided that in the event of the death of the junior partner the senior partner should pay to the widow and children of the junior partner the sum of £75 per

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annum, for seven years, provided the senior partner continued or had an interest in practice therein as a dental surgeon.

Frederick D. Davies died on the 17th May, 1897, having made a will, of which he appointed George Drimmie and Adolphe Davies the executors, and a codicil by which he appointed the said Frederick E. Davies also an executor. Probate was granted to the two former; the latter renounced. Frederick E. Davies purchased the furniture, fittings, instruments, and other chattels, which were on the premises, 27, Westmoreland-street, at the commencement of the partnership, and one moiety of the chattels which were afterwards purchased out of the partnership funds. He continued from the death of Frederick D. Davies to carry on the business.

Adeline, Florence, Zillah, Reginald, and Athol Davies were unmarried: the last three were under age.

This was an action brought by George Drimmie, Adolphe Davies, and the last-mentioned five children, against Frederick E. Davies claiming to have the trusts and agreements of the deed of partnership making provision for the children of Frederick D. Davies carried into execution, and that the defendant might be ordered to pay the said children, or the executors of the said Frederick D. Davies the arrears of the said annuities.

The defendant pleaded that he received no consideration for the agreement on his part in the deed of partnership to pay the annuities to the said children, that there were never any assets of the partnership out of which to discharge the same, and he submitted that the agreement to pay the annuities was not enforceable against him, and gave no right to the plaintiffs to sue in respect of those annuities—the children not being parties to the deed, and the executors not being interested in the payment of the annuities.

Robert Doyle (with him *Ronan, Q.C.*), for the plaintiffs:—

The question is whether the defendant having executed the partnership deed, and taken the benefits conferred by it on him, can, as regards the obligations it imposed, treat it as waste paper. He contends that the annuitants not having been parties to the deed cannot sue on it, and he will probably rely on *In Re Empress*

Engineering Company (1), where it was decided that a mere contract between two parties, that one should pay money to a third would not entitle that third party to sue for it. That class of case does not apply to the present. Here the personal representatives of the person with whom the agreement was made are plaintiffs; and here, moreover, a trust was created for the annuitants, and they are entitled to enforce it: *Page* v. *Cox* (2); *Murray* v. *Flavell* (3); see also *Gandy* v. *Gandy* (4).

Molony (with him *Matheson*, *Q.C.*), for the defendant:—

Here there is a mere personal covenant. In *Page* v. *Cox* (2) definite property was fixed with a special trust. In the present case the defendant paid for his father's share, no partnership property remains, there is no property subject to a trust, and that distinguishes this case from *Page* v. *Cox* (2), and *Murray* v. *Flavell* (3). The cases of *Tweddle* v. *Atkinson* (5), and *In re Empress Engineering Company* (1), distinguishing *Gregory* v. *Williams* (6), apply. There was nothing to prevent the two partners altering the agreement the day after the deed was signed—they were not trustees, no property was impressed with a trust. *Gandy* v. *Gandy* (4) is in the defendant's favour—the annuitants here are in the position of the youngest daughters in that case: see the judgment of Bowen, L.J., referring (page 69) to *Tweddle* v. *Atkinson* (5). See also *Dickson* v. *Reuter's Telegraph Company* (7). The executors have no interest entitling them to sue. There was no consideration for the defendant's agreement.

Doyle, in reply:—

It cannot be said that there was no consideration for the defendant's covenant; his father was carrying on the business, and at the time the defendant had no connexion with it: he was taken into partnership and acquired more than a mere right to purchase the assets—he acquired the benefit of the goodwill, and obtained a standing in his profession. As to the contention that *Page* v.

(1) 16 Ch. D. 125.
(2) 10 Ha. 163.
(3) 25 Ch. D. 89.
(4) 30 Ch. D. 57.
(5) 1 B. & S. 393.
(6) 3 Mer. 582.
(7) 2 C. P. D. 62.

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Cox (1), and *Murray* v. *Flavell* (2) have no application, because there the payments were to be made out of definite property: see the judgment in North, J., in the latter case, p. 93. Here the clear meaning of the deed is that the annuities should be paid out of the profits of the business, though they are not expressly mentioned: there is a trust, and not a mere contract as in *In re Empress Engineering Company* (3).

April 30.

THE VICE-CHANCELLOR:—

The questions to be decided arise upon the clauses of the deed of partnership between F. Davies the elder, and his son F. Davies the younger, dated the 26th June, 1895, on the faith of which the father took the son into partnership with him in the business of surgeon dentist, which the father had carried on for several years previously. The deed was an agreement under seal between the father of the one part, and the son of the other part, no other party being named as such, nor executing the deed. By it the father and son agreed to become partners on the terms and conditions therein stated from the 1st April, 1895, for a period of five years from that date. It provided that the profits should be divided into thirds, two-thirds to go to the father, and one-third to the son, the father to draw £20, and the son £10 monthly. It further contained a clause, No. 15, on which the plaintiffs' rights depend, which is as follows. [His Lordship read this clause.]

The agreement thereby created was of necessity between the father and the son, there being no other party to the deed, and the son thereby contracted with his father for the payments therein provided for his sisters and brothers, and this formed part of the consideration for the agreement on his part, and on the faith of it he was admitted to the partnership. F. Davies, sen., died in May, 1897, whereupon the partnership became dissolved, and F. Davies, jun., the defendant, has carried on the business since. The defendant refuses to pay the annual sums mentioned in the partnership agreement to his sisters and brothers, and denies his liability to pay them, first, on the ground of there having been no consideration for his agreement; secondly, on the ground that the

(1) 10 Ha. 163. (2) 25 Ch. D. 89. (3) 16 Ch. D. 125.

provisions contained in the agreement whereby, in the event of the death of F. Davies, sen., while the partnership continued, he agreed to pay to his sisters and brothers the sums mentioned therein, are not enforceable against him, and do not give any right to the plaintiffs to sue for or in respect of such annuities, those of the plaintiffs who are children of F. Davies, sen., not being parties to said indenture or otherwise concerned therein, and the other plaintiffs who are the executors of F. Davies, sen., not being interested as such executors or otherwise in the payment of the said annuities. Thus, having derived all the benefits conferred upon him by the agreement, he seeks to repudiate his liability to any one on foot of his side of the contract. He introduces this contention in his defence by the averment that there are not, and never were, any assets of the partnership out of which to discharge the annuities. Assuming that this averment is true, it seems to me to be of no importance, as the claim of the plaintiffs is not upon the partnership assets, nor upon the defendant, in respect of any such assets, but personally on his covenant. I think it would not be possible to hold on the true construction of the agreement that the plaintiffs have any other claim, and that the case must be treated as one of personal covenant only.

As for the defence that there was no consideration to the defendant for such a covenant, it is unfounded in fact, for he was admitted a partner, which was a valuable consideration, if any were necessary, and it was one of the terms and conditions stated in the agreement upon which he and his father became partners. The agreement in clause 16 provides a corresponding liability for F. Davies, sen., in case he should survive the defendant, to pay £75 a-year for seven years to the widow and children of the defendant.

The case therefore comes to this, whether any action can be brought by any one against the defendant for his breach of his contract. I say "by any one," because both the daughters and sons of F. Davies, sen., as the beneficiaries, and his acting executors are joined as co-plaintiffs, the latter of course suing only for the benefit of the former.

The defendant's contention is based on the common law rule that in the case of contracts under seal no one can sue who is not

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a party to the deed. That rule is fully stated in the case of *Tweddle* v. *Atkinson* (1), namely, that a stranger to the contract, that is to say, a person who is not a party to the contract, and from whom no consideration moved, cannot sue upon it. The test seems to be whether such a person could be sued upon the contract. Now here the daughters and sons were not parties to the contract, nor did any consideration move from them, nor could they be sued upon the contract. But this rule did not prevail in equity, and since the Judicature Act the rules in equity are to prevail in cases where such a conflict exists. The equitable rule was that the party to whose use or for whose benefit the contract had been entered into has a remedy in equity against the person with whom it was expressed to be made. The Court deems the latter a trustee for the former, and would compel him to execute his trust according to the apparent intention of the contracting parties. In the case of *Page* v. *Cox* (2), which has much resemblance to the present case, an agreement was held to amount to a trust which, as stated by Wood, V.-C., may well be created, though there may be an absence of any expression in terms importing confidence, and a trust cannot be the less capable of being enforced, because it is founded on contract. It was sought to distinguish that case on the ground that there a trust was imposed to pay out of specific property, which, as I have stated, did not exist here, but it seems to me that as the contract here was such that, if the executors of the deceased partner had a right to sue on it, any money recovered by them must have been held by them in trust for the daughters and sons, there is sufficient to create an equity in favour of the beneficiaries. The case chiefly relied on by the defendant was that of the *Empress Engineering Company* (3), where it was held that a contract made by the promoters of the Company with third parties for payment of a sum of money, and which was in itself null and void, could not be made the subject of a claim against the Company when formed by reason of its having been mentioned in the purchase deed as a charge subject to which the business was purchased by the Company. The case was decided principally on the ground that the agreement with the

(1) 1 B. & S. 393. (2) 10 Ha. 163. (3) 16 Ch. D. 125.

third parties being in itself null and void was not capable of ratification, but certainly the learned Judges who decided the appeal drew a distinction between cases where there was intended to be a charge in favour of the third party on specific property, and cases where there was a mere agreement to pay a sum of money to a third party. Jessel, M.R., guards his decision by the observation that he was far from saying that there might not be agreements which may make the third party a *cestui que trust*.

In the case of *Lloyd's* v. *Harper* (1) a question bearing on the principle applicable to such transactions was considered first by Fry, J., and afterwards by the Court of Appeal, namely, whether a guarantee given by a father to Lloyd's Association on the admission of his son as an underwriter could be sued on by persons who had been underwritten by the son. "Lloyd's" were co-plaintiffs in the action with outside persons, not members of Lloyd's, who had been underwritten by the son. One of the questions raised was that Lloyd's not having sustained any damage, could only recover nominal damages for themselves, and could not recover for the losses sustained by third parties by reason of the default of the son as an underwriter. This contention was disallowed. As to it, Lush, L.J. (p. 321), says, "To my mind it is a startling and an alarming doctrine, and a novelty, because I consider it to be an established rule of law that where a contract is made with *A.* for the benefit of *B.*, *A.* can sue on the contract for the benefit of *B.*, and recover all that *B.* could have recovered if the contract had been made with *B.* himself." This principle shows that if the executors of F. Davies the elder, who are co-plaintiffs in this action, had sued alone, they could recover all that the defendant agreed with his father to pay, and of any sums so recovered they would of course be trustees for the daughters and sons.

In the case of *Murray* v. *Flavell* (2), before North, J., and afterwards on appeal, in which the decision in *Lloyd's* v. *Harper* (1) was referred to, the question arose as to the effect of partnership articles, in which it was provided that from the determination of the partnership the retiring partner or his widow should be entitled to receive out of the profits for a stated period an annuity;

(1) 16 Ch. D. 290. (2) 25 Ch. D. 89.

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and it was contended that this was a mere bargain between the partners, and that no trust was created for the widow, and that she could not enforce an agreement to which she was not a party, and which was not communicated to her. The cases of *Gregory* v. *Williams* (1); *In re Empress Engineering Co.* (2); and *Lloyd's* v. *Harper* (3) were considered, and it was held both by North, J., and the Court of Appeal that a valid trust for the widow was created by the articles.

The last case referred to, *Gandy* v. *Gandy* (4), is probably the most important. The action there was brought upon a deed of separation containing a covenant by the husband with trustees to maintain the children. The husband afterwards refused to maintain one of the children, and she sued the husband and the trustees to carry out the trusts of the deed. The husband raised an objection that the plaintiff was not competent to sue upon the deed, and that the only proper parties to sue were the trustees; and it was contended that the children were not parties to the deed, and that the consideration did not move from them. Bacon, V.-C., held that there was a relation of trustee and *cestui que trust* existing, and that as the trustees refused to sue, the *cestui que trust* could sue. From this the husband appealed, and the judgment of the Vice-Chancellor was reversed. Cotton, L.J., stated the rule of law to be as follows:—"As a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with *A.*, is intended to secure a benefit to *B.*, so that *B.* is entitled to say he has a beneficial right as *cestui que trust* under that contract; then *B.* would, in a Court of Equity, be allowed to insist upon and enforce the contract." He considered the objection to the plaintiff suing as fatal to the action in its present form, but he allowed the case to stand over to see whether the plaintiff could induce the trustees to sue. Bowen, L.J., concurred, and said that whatever may have been the com-

(1) 3 Mer. 582.
(2) 16 Ch. D. 125.
(3) 16 Ch. D. 290.
(4) 30 Ch. D. 57.

mon law doctrine, if the true intent and effect of the deed were to give to the children a beneficial right under it, that is to say, to give them a right to have the covenants performed, and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine, and would in a Court of Equity be allowed to enforce their rights under the deed, but that the whole application of that doctrine depends upon its being made out that upon the true construction of the deed, it was a deed which gave the children such a beneficial right.

The case was allowed to stand over. The trustees refused to become plaintiffs. The statement of claim was amended by making the wife and her two eldest daughters co-plaintiffs, and the case came on again for hearing; and it was held that the wife was entitled to sue, for that the agreement was really one between the husband and wife, and the trustees were introduced merely to obviate the objection to the wife suing her husband, and that the case came within the authorities referred to, that where a covenant is entered into with one person for the benefit of another, then if the covenantee will not sue, the person beneficially interested may sue in equity. The case was accordingly heard on the merits and disposed of.

The difficulties raised in these cases do not arise here. In *Gandy* v. *Gandy* (1) it was not disputed that the trustees could sue, and again that the wife could sue, these being parties to the contract. Here we have the personal representatives of F. Davies, senior, who was a party to the contract, and the persons beneficially interested joined as co-plaintiffs suing the defendant. He it was who expressly bound himself to pay these annual sums, and his obligation was to his father, who is now represented by his executors. The defendant having got the full benefit of that contract, now inequitably declines to perform his part of it. Consequently it is not necessary to decide the question whether a fiduciary relation exists between the executors and the beneficiaries for the purpose of enabling the suit to be maintained by the latter. The executors of course admit that any moneys recovered by them from

(1) 30 Ch. D. 57.

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the defendant will be held by them for the benefit of the daughters and sons as provided by the deed.

There must be judgment for payment by the defendant to the executors of the sums due on foot of the arrears of the annuities, and for payment of the accruing gales to be applied by them in accordance with the terms of the 15th clause of the deed.

The defendant must pay the costs of the action.

D. M'C. M.

Appeal. June 20.

The defendant appealed (1).

Matheson, Q.C., and *T. F. Molony*, for the appellant.

Ronan, Q.C., and *Robert Doyle*, for the respondent.

FITZ GIBBON, L.J. :—

We are all satisfied that this appeal must be dismissed on plain and simple grounds, and in so doing we are not to be understood as entertaining any doubt of the liability of the defendant to maintain his younger brothers and sisters in accordance with the terms of his agreement. The agreement of June 25, 1895, was made between father and son ; being under seal it did not require valuable consideration to support it, but even if it did, there was, in my opinion, valuable consideration for it in the fact that the defendant got a share in the business during his father's life, and the right of succession to it on his father's death. *Facio ut facias* is just as good consideration as *do ut des ;* the deed of partnership contained covenants binding both father and son, and it was a contract for valuable consideration on both sides. That being so, the parties to it could enforce it; and the only defence is that the present plaintiffs cannot maintain the action, and that the parties for whose benefit it was intended cannot sue for the relief which it purports to provide for them.

The clause in question mentions the death of the senior partner as the time when it was to come into operation. It was, therefore, a contract which was not intended to die with the contracting

(1) In the Court of Appeal, before FITZGIBBON, WALKER, and HOLMES, L.JJ.

party himself, and the benefit of it passes to the executor. It is a very reasonable and ordinary contract that, in the event of the death of the senior partner during the partnership, the junior partner, continuing the business, should pay to each of the three daughters of the senior partner a yearly sum of £40 for a period of seven years, but should any of the daughters be married or settled in life prior to the death, or within seven years subsequently, then the liability of the junior partner was to cease; he was further to pay to his two younger brothers, from the death of his father, if the partnership should be then existing, a sum of £15 a-year each until majority, but in no event for more than seven years from the father's death.

The first question is—whether the executors can sue? I can see no reason to doubt that they can sue at common law. It is said that there is no remedy, because this is not an action for the benefit of the assets. But it is an action to recover money, under a contract made with the deceased, for the benefit of members of his family who cannot help themselves, and who have natural claims on him and on his assets. It is the same as the common contract which a man makes with an insurance company for payment of an annuity, or a lump sum, to his widow or to his children, after his death. We find a similar and mutual contract on the opposite side of this very deed, for in the event of the death of the junior partner, the senior partner agreed to pay to his widow and children £75 a-year for seven years, if the senior partner continued to practise as a dental surgeon.

Without going to later cases *Davenport* v. *Bishopp* (1) seems to me directly in point. There, in a marriage settlement comprising property of the wife only, the husband and wife covenanted with the trustees that any property to which the wife might become entitled during the coverture should be conveyed, in the events which happened, to the husband for life, with remainder to the wife's niece. After the death of the wife, the husband filed a bill against her heir-at-law, praying that the real estate might be conveyed to the uses of the settlement; and it was held that the decree for specific performance should extend to the interest of the niece (who

(1) 1 Phil. 698.

Appeal. 1898.

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Fitz Gibbon, L.J.

was also dead). On appeal, an attempt was made to draw a distinction between a benefit to the contracting party and to the niece, because she was not within the marriage consideration; and it was held that the right to specific performance of part of the contract carried with it the right to specific performance of the whole. *A fortiori*, the beneficiaries here would be entitled either to a decree for specific performance, or to a declaration of their rights under the contract.

It was said that this was not a common law action. But the Judicature Act has assimilated the procedure at law and in equity, and if the executor can recover the arrears, he is entitled to a declaration of his right to recover them, and such a declaration would involve the disposition both of what had accrued due, and also of any future instalments that might hereafter be recovered. Upon these grounds the executor, as representing one of the two contracting parties, is, in my opinion, entitled to succeed in this action against the other. There is ample authority to show that if the executors had received this money, they would be bound to apply it for the use of the children.

In *Page* v. *Cox* (1), an obligation was held to attach, in equity, on a surviving partner in favour of the widow of a deceased partner, though it was sought to make out a trust in favour of the widow which would attach on the property.

Murray v. *Flavell* (2) was a case of a partnership between two solicitors, and the partnership articles contained a clause, which provided for a terminable annuity in favour of the wife of either who should die during the partnership. It was held that a trust of the annuity was created in favour of the widow, and it follows that, if necessary, equity would give a remedy to the children here. It is quite true that article 15 does not create a charge on the partner's property, but article 16 shows that the parties were contracting with respect to the profits of the business. It contains the proviso that in the event of the death of the junior partner, the senior partner should pay to the widow and children of the junior partner £75 a-year for seven years, provided that the senior partner continues, or has an interest in, the practice as a dental

(1) 10 Ha. 163. (2) 25 Ch. D. 89.

surgeon. That was not introduced in the case of the son, because he was a young man intending to carry on the business, who in all probability would survive his father. It appears to me that without overruling *Murray* v. *Flavell* (1) it is impossible not to make the defendant responsible in equity for carrying out the terms upon which he got the business.

There is a passage in the judgment of Bowen, L.J., in *Gandy* v. *Gandy* (2), which contains sufficient to sustain the decree which we propose to make in the present case. That was the case of a separation deed, by which the husband covenanted to pay an annuity to the trustees for the use of the wife and two eldest daughters, and also to maintain the two youngest daughters. One of the latter subsequently brought an action against the trustees, and her father who refused to maintain her after she reached the age of sixteen. Bowen, L.J., said :—"Whatever may have been the common law doctrine, if the true intent and true effect of this deed was to give to the children a beneficial right under it, that is to say, to give them a right to have these covenants performed, and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine, and would, in a Court of Equity, be allowed to enforce their rights under the deed."

The decree will be for the specific performance of this agreement by the defendant. But the rights of the plaintiffs, and the liability of the defendant, cannot stop by paying what is due up to the present time ; the order must provide for future instalments.

If the law was unable to give effect to this agreement, I do not see how anyone could secure an annuity for his wife and children out of the profits of a business.

WALKER, L. J. :—

I concur. The terms of the agreement expressly point to the death of the senior partner as the time when this provision was to come into operation. That contemplates a right to arise after his death. The executors being here plaintiffs, a negation of their

(1) 25 Ch. D. 89. (2) 30 Ch. D. 57, 69.

Appeal. 1898. DRIMMIE v. DAVIES. Walker, L.J.

right to sue would involve that no man could by contract with another, for the best consideration, make a provision for his child or widow in the form of an obligation by that other to pay.

In my opinion *Gandy* v. *Gandy* (1) is a direct authority in this case. It was held there that when the trustees of a separation deed, refused to sue, the wife would be justified in suing as beneficially interested, when the trustees refused. But no one doubted the right of the trustees to sue, they being parties to the deed, not as trustees, but as contracting parties. So I think that the children can sue in the same way.

HOLMES, L. J. :—

I decide this case on very simple—even elementary—grounds. The proposition affirmed in *Tweddle* v. *Atkinson* (2) is excellent law; but it has no application to the present case. In that case it was held that a contract by which a benefit was provided for a person not a party to it cannot be sued on by such person: but it contains no suggestion that the contract could not have been enforced by the person with whom it was made. In this case Davies, junior, covenanted for valuable consideration with Davies, senior, that in certain events he would pay certain annuities to the children of the latter. If such annuities had become payable in the life of the covenantee, and they were not paid, what legal obstacle would there be to his suing the covenantor? Indeed, I believe that it is admitted that such an action would lie, but that it would only result in nominal damages. A result more repugnant to justice, as well as to legal principle, I can hardly imagine. The defendant would thereby escape from paying what he had undertaken to pay by making an illusory payment never contemplated by either party. Well, if Davies, senior, would have been entitled to sue in his lifetime if the annuities were then payable, his executors would have the same right of action after his death. As I have already said, the question is elementary.

I desire to add that I am not to be understood as holding that in the circumstances of this case the children could not have maintained the action without the personal representatives. I see

(1) 30 Ch. D. 57. (2) 1 B. & S. 393.

grounds resting on both authority and legal principle for thinking that *Tweddle* v. *Atkinson* (1) is distinguishable; but it is unnecessary to consider this.

Solicitor for plaintiff: *W. T. Sheridan.*
Solicitor for defendant: *Thomas F. Monks.*

R. D. M.

IN THE MATTER OF THE ESTATE OF GERALDINE HENRIETTA TOWNSEND MUNDY, OWNER; ROBERT STAYNER HOLFORD, PETITIONER.

Ross, J.
1898.
Dec. 16, 19.

Tithe rentcharge—Deduction from, of poor-rate—1 & 2 *Vict. c.* 56, *s.* 76—61 & 62 *Vict. c.* 37.

(I.) Notwithstanding the relief granted to the payer of tithe rentcharge by the Local Government (Ireland) Act, 1898, in providing that the half poor-rate is not in the future to be deducted from rent paid to him, he can still, under 1 & 2 Vict. c. 56, sect. 76, deduct the whole of the poor-rate when paying tithe rentcharge to the owner thereof.

(II.) In case of the redemption of tithe rentcharge, where an estate is sold to tenants in the Land Judge's Court, that Court is the proper tribunal to fix the redemption price.

MOTION on behalf of the party having carriage for an order to fix the redemption price of six several tithe rentcharges appearing in the Schedule of Incumbrances.

W. M. Jellett, for the parties having carriage:—

Notwithstanding Order V., Rule 13, of the Regulations under the Land Act, 1896, sect. 23, the Land Judge is the proper person to fix the redemption price: Land Law (Ireland) Act, 1887, sect. 15 (2); Land Law (Ireland) Act, 1896, sect. 31 (4).

P. D. Fleming, for the owner of the tithes:—

We say an arbitrator should be appointed: Order V., Rule 13, of the Regulations under the Land Act, 1896, sect. 23.

(1) 1 B. & S. 393.

Ross, J. 1898.

In re MUNDY'S ESTATE.

[Ross, J.—I am satisfied that it is the duty of the Court to fix the redemption price.]

O'Connor, Q.C., for the owner of the estate:—

As to the basis on which the redemption is to be calculated under 1 & 2 Vict. c. 56, s. 76, "every person immediately liable to pay tithe may deduct therefrom, for every pound in value of such tithe, the entire poundage of every rate made under this Act upon the hereditaments out of which such tithe may arise." Section 74 enabled the occupier of land to deduct half the poor-rate; and sect. 75 deals with the case where a person who receives rent also pays it. By the Local Government (Ireland) Act, 1898, Schedule VI., part 4, sect. 74 of 1 & 2 Vict. c. 56, is in the whole, and sect. 75 is in part, repealed; but sect. 76 is not mentioned; so although under sect. 52 (3) "the occupier of a hereditament is not entitled to deduct from his rent any part of the poor-rate," the tithe-payer can still make the deduction under 1 & 2 Vict. c. 56, s. 76. Tithe rentcharge is not an agricultural hereditament; it is not a head rent; it is an incorporeal hereditament running along side by side with the land; and it was necessary to make it a superior interest for the purposes of the Land Purchase Acts. See Land Act, 1896, sect. 31 (8).

P. D. Fleming, for the tithe owner:—

The tithe-payer cannot deduct the half poor-rate any longer. It is in its nature a charge on the lands (O'Leary, pp. 125, 126). But the whole incidence of poor-rate has been altered by the Local Government Act of 1898, sect. 48; sub-sect. (4) contains a definition of agricultural land. The guardians of the poor will no longer make any rate. Under sect. 51 there will be only one county fund, called poor-rate; levied by a different body, and including grand jury cess. Up to the present the tithe-payer has one-half of the poor-rate deducted from his rent, and so he was entitled under sect. 76 of 1 & 2 Vict. c. 56 to make the deduction when paying tithe. I say sect. 76 is repealed by implication; and its omission from the schedule was a mistake. The agricultural grant is in aid of all the owners along the line.

O'Connor, Q.C., in reply :—

The intention of Parliament, as expressed in the Act, was to allow section 76 to remain unrepealed.

Ross, J.
1898.

In re
MUNDY'S
ESTATE.

Ross, J. :—

Dec. 19.

Up to the present twenty years' purchase of the tithe, less the poor-rate, has been the usual sum paid for redemption. Before the passing of the Local Government (Ireland) Act, 1898, the tenant paid half the poor-rate, and the landlord half; the landlord then, while only paying one-half, was entitled under section 76 of 1 & 2 Vict. c. 56, to deduct the whole of the poor-rate from each pound of the tithe paid. Now we have the Act of 1898. As to its policy, I have nothing to do. I can only be guided by its words, and not by vague considerations as to its policy. I see no answer to the argument that section 76 remains unrepealed. The Act was drawn with care; the various statutes and clauses to be repealed are set out with precision in the schedules. Part IV. of the 6th schedule repeals several sections of 1 & 2 Vict. c. 56; and leaves this section unrepealed, which gives the person who pays the tithe rentcharge the right of deducting the whole of the poor-rate. I assess the amount on that basis. I therefore direct that the six charges be redeemed at the price mentioned in the schedule to the notice.

I shall give every opportunity for appealing, and shall, if required, preface my order with a recital, "it appearing to the Court" with that object (1).

Solicitors for the party having carriage: *Barrington & Son.*
Solicitors for the tithe owner: *Wright & Son.*
Solicitors for the owner of the estate: *W. Roche & Sons.*

W. C. S.

(1) On a subsequent day *Mr. Fleming* informed the Court that he had decided not to appeal. The order was accordingly issued without the recital.

Appeal.
1899.

Feb. 4.

RAMSAY *v.* SIMPSON (No. 2) (1).

Practice—Costs—Administration action—Manager appointed by the Court—Unsuccessful action brought by the manager with the sanction of the Court—Insolvent estate—Priority—Solicitor—Realization of assets.

A manager appointed by the Court in an administration suit, obtained leave to proceed with an action commenced at common law by the executors to recover a balance of £668 claimed to be due in respect of a contract with the testator. The defendants in that action filed a counter-claim, and in the result a larger amount was found due on the counter-claim than for the plaintiff in the original action, and judgment was entered for the defendants for the difference, with costs. The fund in Court, which represented the available assets of the testator, was insufficient to pay the costs in the common law action of the defendants in said action, and those of the manager. It appeared that no sum out of the assets would be payable to the manager personally in respect of a considerable balance certified to be due to him, and that the costs in question were due and payable to his solicitor.

Held (reversing the decision of the Vice-Chancellor), that the manager's solicitor was entitled to be paid his costs in the common law action, in priority to the costs of the defendants therein, out of the fund in Court.

This action was commenced in the Vice-Chancellor's Court by the plaintiff as a legatee to administer the assets of Robert Simpson, who died on the 14th June, 1879. The testator by his will directed his executors to carry on his business as a builder and contractor after his death. On the 15th November, 1893, an order was made for the administration of the testator's real and personal estate, and on the 24th June, 1894, James Simpson was appointed manager. On the 9th November, 1896, the manager applied to the Court for, and obtained, an order for leave to proceed with an action which had been instituted in July, 1894, to recover the sum of £668, being the balance claimed in respect of certain gas works executed for the Trim Commissioners. The defendants filed a counter-claim, with the result that there was a verdict for the

(1) Before FitzGibbon, Walker, and Holmes, L.JJ.

plaintiff for £200, but the defendants recovered £410 on the counter-claim, and accordingly a verdict and judgment was entered for the defendants for £210 with costs. The Queen's Bench Division on a motion for a new trial directed judgment to be entered for the plaintiff for £130; but, on appeal, the Court of Appeal restored the original verdict. By the Vice-Chancellor's judgment on further consideration, dated the 18th December, 1895, the plaintiff was declared entitled to his costs, and by an order dated 4th July, 1898, the manager was declared entitled to costs properly and necessarily incurred by him.

The fund in Court being insufficient for the payment of the costs of the parties, and the costs of the manager, the Vice-Chancellor, on the 18th July, 1898, determined the priority in which the costs should be paid. [See the case reported, *ante*, p. 69.]

The case was entered in the list for allocation of the funds in Court; and in the payment schedule, the plaintiff proposed to pay the costs of the manager in the common law action: but omitted the costs of the Trim Town Commissioners from the allocation schedule altogether. The Trim Commissioners then intervened, and moved that they should be placed on the payment schedule in priority to the manager for the sum of £72, being the balance unpaid of their costs in the common law action.

On the 1st February, 1899, the Vice-Chancellor granted the Commissioners' application, and from that order the manager appealed.

Henry Maxwell, for the appellant:—

The business of the testator was carried on after his death in accordance with directions in the will. The executors would therefore be entitled to be indemnified against all liabilities incurred in carrying on the business, in priority to claims by the testator's creditors out of the entire estate: *Dowse* v. *Gorton* (1); and creditors of the executors are entitled to stand in the place of the executors: *Re Owen*; *Frisby, Dyke & Co.* v. *Owen* (2).

(1) [1891] A. C. 190. (2) 66 L. T. (N. S.) 719.

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The receiver and manager is an officer of the Court, and proceeded with the action with the sanction of the Court, and he is not answerable for the correctness or propriety of the orders which he receives: *Morison* v. *Morison* (1). The rule has always been to pay the receiver before distributing the estate, without regard to its sufficiency to meet the claims upon it: *Batten* v. *Wedgwood Coal and Iron Co.* (2). *Dronfield Silkstone Coal Co. No.* 2 (3), though overruled, is important, for the distinction drawn by Chitty, J., between the position of a receiver and a liquidator. The personal liability of the manager and receiver, and of his co-plaintiffs in the common law action is not disputed, but here the costs awarded to the manager are subject to his solicitor's lien for costs which are due to him. They cannot be attached by a judgment creditor of the client to the prejudice of that lien: *Cormick* v. *Ronayne* (4); *Barker* v. *St. Quintin* (5).

The cases as to liquidator's costs have no application. In *Home Investment Society* (6) the liquidator entered into the litigation at his own peril. *Re London Drapery Stores* (7) only decided that a person who had succeeded in an action against a company was entitled to be paid his costs, but no question of priority as against the liquidator was decided in that case.

Molony, for the respondents:—

The Trim Town Commissioners are entitled to their costs in priority to those of the manager. The action was instituted with the sanction of the Court, and if the action had been successful the amount of the verdict would have gone to swell the amount in Court. It is reasonable that the costs of a successful defendant in an action should be paid in priority to those of an unsuccessful plaintiff. *Re London Drapery Stores* (7) decides that the defendant is entitled to payment of his costs in full.

(1) 7 DeG. M. & G. 225.
(2) 28 Ch. D. at p. 324.
(3) 23 Ch. D. 511.
(4) 22 L. R. Ir. 140.
(5) 12 M. & W. 441.
(6) 14 Ch. D. 167.
(7) [1898] 2 Ch. 684.

FITZ GIBBON, L. J.:—

When the facts are understood, this appeal does not appear to me to present much difficulty as to the principle on which it should be decided. On July 4, 1898, the Vice-Chancellor made an order, by which he declared that James Simpson, the manager, was entitled to the costs properly and necessarily incurred by him in realizing the estate. There was a sum of £94 due by the manager to the estate, and a sum of £753 was ascertained to be due to him by the estate for costs, less by any balance due by him on the final account. We have an affidavit showing that the whole amount of these costs remains due and unpaid to the manager's solicitor, except a sum of £19 4*s.* 9*d.*

The way in which the question now arises is this—an action was brought for the administration of the assets of Robert Simpson, and it cannot affect the rights of the parties *inter se*, that the business which was administered by the Court, and was carried on by the manager under the direction of the Court, had been previously carried on by the executors of Robert Simpson for a considerable period after his death, pursuant to a direction in his will. The Court has to deal only with the claim of the Trim Town Commissioners to be paid out of the assets of Robert Simpson, as distinguished from any claim which may exist against the *bona propria* of the executors. In administering the assets, a claim was made against the Commissioners as customers of the business; the manager applied to the Court for leave to bring an action to recover the claim, and he obtained such leave. He brought the action; the defendants filed a counterclaim; there was a verdict for the defendants on the counterclaim for a larger amount than the verdict for the plaintiff on the claim; the Queen's Bench Division entered judgment for the plaintiff; and this Court restored the verdict and judgment against the plaintiff, which had been obtained at the trial.

Laying aside the question of personal responsibility, all the expense of the action was incurred by the manager, acting under the direction of the Court, in unsuccessfully endeavouring to benefit the estate which he was managing with the sanction of the Court. In such a case I understand the rule to be that, as between creditors

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and the assets, the officer of the Court has the prior right to be paid his costs, and to be indemnified, out of the assets. The application of that rule cannot be affected by the result of the action; the proceeding is taken on behalf of the assets as a whole; and the officer is entitled to be indemnified, in priority to any creditors, out of the assets, as a whole—*i.e.* out of any available assets—against the expense of the proceedings which he has taken by the order of the Court. There is no distinction, in principle, between a large and unprofitable outlay of this kind, and the ordinary costs of realizing the estate.

The Commissioners, as creditors, instituted a motion that they should be paid their demand in priority to the manager's costs of this action. Still confining ourselves to the assets, the creditors are not entitled to be paid in priority to the costs incurred by him in his capacity of manager, and by direction of the Court. This was not disputed, but the Commissioners contended that they were entitled to be paid the money due to the manager, because they had a personal judgment against him, as well as a judgment against the assets. They would be so entitled, if the money was his. It would in effect be a case for a garnishee order. But when money is payable for costs, it is payable to the solicitor, and not to the client personally, so long as the solicitor has not been paid by the client. In fact, the solicitor here advanced the money to carry on the litigation which the Court directed. There is no money payable to James Simpson, because Mr. Figgis has proved that the costs have been taxed to £753 9*s.* 1*d.*, and that £19 4*s.* 9*d.*, and no more, has been paid to him, leaving £734 5*s.* 4*d.* still due to him. The payment schedule contained the name of the solicitor as the person to whom the money was to be paid, and the sum so payable exhausts the fund. Therefore we must state in our order that, it being admitted that there is no sum now available for James Simpson, and the Court being of opinion that the Commissioners are not entitled to be paid in priority to the solicitors of James Simpson, their names must be struck out of the payment schedule, and the money will go to Mr. Figgis. But this order and payment will be made without prejudice to any claim which the Commissioners may have against James Simpson personally.

WALKER, L.J. :—

I agree. If there was anything coming to James Simpson personally in the administration action, the Trim Commissioners would be entitled to attach that to satisfy their personal claim against James Simpson. It is now admitted that there will be nothing coming to James Simpson personally, after satisfaction of the manager's costs, which are prior to any claim of James Simpson under the administration. Therefore the manager's costs of proceedings, commenced under an order in the administration action, must be paid, as part of the costs or expense of realizing the estate, in priority to the personal claim of the Trim Commissioners.

HOLMES, L. J. :—

The Trim Town Commissioners were sued by Mary Simpson, John Simpson, and James Simpson, who were named defendants in a counterclaim of the Commissioners. There was judgment with costs for the Commissioners in both the original action and the counterclaim; and there is no doubt that the three Simpsons are personally liable for these costs.

This application is not conversant with such personal liability which is admitted. It seeks to have them paid out of the assets of Robert Simpson, who died in the year 1879, and whose assets have been administered in this action. The ground of the application is that the action was brought by the direction of the Court in administering Robert Simpson's estate; and, if any sum had been recovered in it, such sum would have increased his assets. If these assets were sufficient to pay all the claims on them, the Commissioners would undoubtedly have been entitled to be paid their costs thereout; but the fund is not large enough to pay the defendants' costs, and also the costs incurred under the direction of the Court in bringing the unsuccessful action. The question then is, to which set of costs is priority to be given. I think it clear that the costs of realizing the fund is the first charge thereon; and the costs of realization include the costs of unsuccessful efforts to realize, undertaken by direction of the Court, as well as efforts that succeed. Therefore the costs of conducting the action take

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priority. No doubt if it could be shown that any of the plaintiffs has now a personal right to receive any portion of those costs, the Commissioners would be entitled to receive such portion by reason of the personal liability of the plaintiffs; but the whole amount is due to the solicitor who carried on the proceedings, and it is he, not his client, who is the person entitled to be paid out of the funds in Court.

Solicitor for the manager: *Figgis.*
Solicitor for the Trim Town Commissioners: *John Clark.*

R. D. M.

In re ARNOTT, Deceased.

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1899.
Jan. 20.

(1898. No. 1316.)

Will—Trustees, appointment of—Powers vested in two trustees to be exercised by one—Position of co-trustee.

A testator devised and bequeathed his real and personal estate to his wife and eldest son on trust for sale, but with unlimited powers of postponing sale and of management meantime, and of paying legacies before the time specified in the will, and appointed his wife and eldest son executrix and executor. By a subsequent clause in his will the testator declared that so long as his son should be a trustee of his will all the powers vested in his trustees should be exercised by his son solely as if he were sole trustee, with complete power of management and of selling and buying and varying investments without the concurrence of or reference to his co-trustees:—

Held (on an originating summons taken out to ascertain the opinion of the Court), that the effect of the clause was to vest in the son during his life the powers conferred on the trustees in the earlier clauses of the will as if he were sole trustee, so as to bind the widow to carry out his decisions arrived at in good faith, and that the clause was not inconsistent with the rest of the will, nor invalid nor void.

Adjourned Summons.

This was an application under Order LV., R. 4, to take the opinion of the Court upon certain questions arising on the construction of the will of Sir John Arnott, deceased. The testator's will was dated August 11th, 1897. He died on March 28th, 1898, and the will was proved on April 13th, 1898, by his widow, Lady Arnott, and his eldest son, Sir John Alexander Arnott, the executrix and executor therein named.

The material portions of the will, which was divided into paragraphs, were as follows:—

1. I appoint my son, John Alexander Arnott, and my dear wife, Emily Jane Arnott, hereinafter called my trustees, and on the death of my said wife my son, Loftus Percival Arnott, to the

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offices of trustee and executor of this my will. I declare that all the trusts, powers, and authorities hereinafter vested in my trustees shall devolve upon and be exercisable by the survivors or survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will, and I hereby declare that my trustees shall be trustees for the purposes of the Settled Land Acts, 1882 to 1890.

In paragraphs 2 to 9 the testator gave certain pecuniary and other legacies.

10. I declare that the payment of each of the legacies hereinbefore given by this my will shall be deferred until the expiration of the period of twenty years after my decease. Nevertheless I authorise my trustees to raise and pay any of such legacies at any time before the expiration of the said period, if they shall in their uncontrolled discretion think fit, and without making any provision for the payment of the remaining legacies. And I direct that each of the said legacies respectively shall bear interest at the rate of 4 per cent. per annum from the day of my death until paid; and that such interest shall be raised out of my estate and paid half-yearly to the person or persons for the time being entitled to the income of such legacy.

By clause 11 the testator devised and bequeathed his real and personal estate to his trustees upon trust for sale, and to hold the proceeds upon trust for his wife and children as therein mentioned.

Clauses 12 to 14 contained specific provisions as to the legacies already given by the earlier clauses. Clause 15 authorised the postponement of the sale of his property, so long as the trustees, in their uncontrolled discretion, should think proper, and gave them extensive powers of management and of leasing. Clause 16 gave them complete discretion to carry on or discontinue any business which had been carried on by the testator, and to act in the conduct of such business as they should in their absolute discretion think fit, without being answerable for any loss arising thereby.

Clause 17 authorised them to convert any business or undertaking of the testator into a limited company, with extensive powers of taking shares and debentures in such company, and of acting as directors thereof.

18. Provided always, and notwithstanding the trusts aforesaid,

I hereby declare that so long as my son, John Alexander Arnott, shall be a trustee of this my will, all the powers and authorities hereinbefore vested in my trustees with respect to, or in connection with, my property, or the businesses or undertakings in which I may be engaged at my death, shall be vested in and exercised by my said son solely, as if he were the sole trustee of this my will, and he shall have the complete and uncontrolled power of management of and over all my property and business of every nature and kind, including appointment of managers, secretaries, agents, and all other officials of any kind, and shall have power to sell and buy in or vary the investments from time to time of my property and otherwise at his sole and uncontrolled discretion, and I hereby empower my said son to exercise all such powers and authorities without the concurrence of, or any reference to, his co-trustees, and I declare that if my said son shall require to supply further capital for the purposes of the said businesses or undertakings my trustees shall, at his request, raise such further capital out of my estate, and apply the same in such manner as he shall direct. I also direct that during such period as aforesaid my said son shall, in respect of any shares in companies which may from time to time form part of the trust estate, have the power of voting at meetings of the companies in which such shares are held, as if such shares were vested solely in him.

19. Provided also, and I hereby declare that my trustees may, at their discretion, instead of selling or converting my residuary real and personal estate, or any part thereof, at any time or times after my death appropriate or allot any part or parts of the same premises to answer any of the pecuniary legacies bequeathed by this my will or codicil hereto, or any of the shares in my residuary estate hereby given in trust as hereinbefore mentioned, at such valuation and estimate as my trustees shall think fit (which valuation and estimate shall be final and binding on all persons interested under this my will or any codicil thereto), and may execute and do all such assurances, matters and things as may be necessary or expedient for effectuating any such appropriation or allotment (and that every such appropriation or allotment shall take effect at such time or times, for such period or periods, for or in respect of such sum or sums, and either provisionally or

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conditionally or otherwise, and generally in such manner as my trustees shall, in their discretion, think fit), and that any property so appropriated or allotted, or the proceeds thereof, if sold or converted, shall, until the same shall be payable or transferable to some person or persons absolutely entitled thereto, be vested in and held by my trustees, and be and remain subject (so far as the nature of the property and circumstances will permit) to the trusts for sale, conversion, investment, and variation of investment, and postponement of sale and conversion, and of management until sale, and all other incidental or ancillary powers and provisions herein contained or implied by statute, in the same manner as if no such appropriation or allotment had taken place, and that subject as aforesaid the property so appropriated or allotted, and the proceeds of sale and conversion thereof, and the investments for the time being representing the same shall be held upon the like trusts, and with and subject to the like powers and provisions as are herein declared or contained concerning the legacy or share in respect of which such appropriation or allotment shall have been made.

Clause 20 provided that the power of appointing a new trustee or trustees of his will should be exercisable by his wife and his son, John Alexander Arnott, during their joint lives, and by the said John Alexander Arnott if he should survive the testator's wife during his life, and in case of the death of the said John Alexander Arnott that new trustees should be appointed under the direction of the Chancery Division of the High Court of Justice in Ireland, provided that in the event of the testator's wife marrying again the power of appointing new trustees should thenceforth be exercisable as if she had then died, and he declared that any vacancy in the trusteeship should be filled up within six months after such vacancy should take place, and that the trust should not be full unless there should be at least two trustees, and he declared that separate trustees might at any time be appointed for any fund or part of his estate held on trusts distinct from those relating to other parts of his estate.

By clause 22 the testator provided after the death or second marriage of his wife his trustees should not, so far as any of his children who should for the time being be minors, exercise the powers of maintenance conferred by section 43 of the Conveyancing

Act, 1881, but that on the death or second marriage of his said wife such of his children, if any, as should be under the age of twenty-one years, should be made wards of the Chancery Division of the High Court of Justice in Ireland, and that any provision for their maintenance should be made under the direction of such Court.

Clause 23 contained very wide powers of investing all moneys liable to be invested, and amongst others in the stocks, funds, shares, debentures, mortgages or securities of any corporation company, or public body—municipal, local, commercial, or otherwise in the United Kingdom or abroad.

Clause 24 declared the wish of the testator that if any question of difficulty should arise touching the administration of his estate or the carrying into effect the trusts of his will, or if any difference or dispute between any of his legatees or devisees should arise, the same should be submitted by his trustees for the decision or adjudication of the Chancery Division of the High Court of Justice in Ireland.

The testator made several codicils to his will, the contents of which are not material.

Differences arose between the advisers of Lady Arnott and Sir John Alexander Arnott as to the meaning and effect of clause 18; and a summons was accordingly taken out by Lady Arnott as plaintiff against Sir John Alexander Arnott as defendant, to obtain the opinion of the Court upon the following questions:—

(1) Whether clause 18 of the will is invalid and void as being inconsistent with, contradictory, and repugnant to the other provisions of the will?

(2) Whether in case clause 18 is valid, its effect is to constitute the defendant, Sir John Alexander Arnott, the sole judge of all matters whatsoever relating to the administration of the estate and the carrying out of the trusts of the will, so as to bind the plaintiff to carry out without question any decision that he may arrive at with respect to all the trusts and powers conferred on the trustees by the will?

(3) Whether in case clause 18 is of any validity, it applies only to the powers and duties conferred on the trustees by clauses 15, 16, and 17 thereof?

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(4) In case clause 18 is valid, whether the plaintiff can be made responsible as for a breach of trust for any act done by her as trustee under the direction of her co-trustee, the defendant, or whether the effect of clause 18 is to exonerate her from all responsibility in respect of any such act done by her as aforesaid.

The summons was adjourned into Court.

The Right Hon. The MacDermot, Q.C., Price, Q.C., and *Gerald F. Brunskill*, for the plaintiff:—

Clause 18 deals with the present duties of executors as well as the future duties of trustees. Any provision to modify or restrict the position of an executor is void, although a provision that one executor shall not meddle during the life of the other executor is good, but that is because it makes them executors successively: Bacon's Abridgment, vol. 3, p. 452, Title Executors; Wentworth on Executors, p. 31. As regards the plaintiff's position as trustee the clause is void also, for a testator cannot appoint a person a trustee, and at the same time say that that person must do everything which his co-trustee may order him to do. There is a difference between the liability of an executor and of a trustee, for one executor is not liable for the devastavit of his co-executor, who can act alone, whereas in the case of co-trustees the office is a joint one, and both must act, and one cannot shield himself by saying he only acted for conformity, as the law does not recognise any distinction between an active and passive trustee: Lewin on Trusts, 10th ed., p. 278.

Ronan, Q.C., Matheson, Q.C., and *H. D. Conner* for the defendant:—

Clause 18 cannot be struck out; it is not inconsistent with the rest of the will, the scope of which is to vest all the property in trustees, giving no legatee any right to be paid until after the expiration of twenty years. Executors are not mentioned in clause 18; it merely confers exceptional powers as trustee on the defendant during his life. The plaintiff is in the position of a supervisor; she can come to the Court if she thinks that the defendant is acting improperly. The testator placed exceptional

confidence in the defendant to manage the various undertakings in which he was engaged at the time of his death, and made him what is popularly called "the acting trustee." The statements quoted from Bacon's Abridgment and from Wentworth are founded on the case reported in 1 Dyer: 19 Hen. 8 [3 b.]; there Fitzherbert, J., dissented.

The third and fourth questions should not be answered by the Court.

Brunskill, in reply:—

Clause 18 does not make the plaintiff's concurrence necessary; it gives the defendant absolute power without consulting her. No authority has been cited where such a special power as this was held to be good. Clause 18 refers to the earlier clauses, *e.g.* clause 10, which authorised the executors to anticipate the time fixed for payment of legacies, and to the later clauses 19 and 23, to which it is repugnant. The plaintiff is entitled to know what her liability as co-trustee is.

THE MASTER OF THE ROLLS:—

I think that the case is free from any real difficulty, so far as the question before me is concerned. The will of Sir John Arnott, which is dated 11th August, 1897, disposes of a very large estate. It blends together his real and personal estate in one, so as to form a common fund, the amount of which, I believe—for I saw the documents prepared for probate—comes to over £750,000. The will commences with the appointment of executors and trustees. "I appoint my son, John Alexander Arnott, and my dear wife, Emily Jane Arnott (hereinafter called my trustees), and on the death of my said wife, my son Loftus Percival Arnott, to the offices of trustee and executor of this my will, and I declare that all the trusts, powers, and authorities hereinafter vested in my trustees shall devolve upon, and be exercisable by, the survivors or survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will. And I hereby declare that my trustees shall be the trustees for the purposes of the Settled Land Acts, 1882 to 1890."

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By clause No. 11 he devises and bequeaths all his real and personal estate to his trustees upon trust.

It is not necessary to state the will in detail. It contains provisions as to pecuniary and other legacies. Clause 10 declares that the payment of certain legacies given by the will shall be deferred until the expiration of the period of twenty years after his decease, with power to the trustees notwithstanding to raise and pay any of such legacies at any time before the expiration of that period. I mention that because it shows that the testator had not before his mind very clearly the exact distinction between the duties of "executors" and "trustees."

Ordinarily speaking, an executor has discharged his duty as such when he has collected the assets, paid the Government duties and debts, and distributed or set aside the legacies (including the residue). If he holds a legacy after the time it is payable he usually holds not as executor but as trustee, as in *Phillipo* v. *Munnings* (1). The trustees under this will have very large powers expressly conferred on them, such as those in clauses 12 and 13, as well as in clauses 14, 15, 16, and 17, and these powers are conferred in terms which, during the joint lives of Lady Arnott and her stepson, the present Sir John Arnott, would apply to both trustees, and they would no doubt place them on absolute equality so far as the duties of trustees are concerned, in relation to the custody and preservation of the property, and the discharge of the duties incumbent on the trustees under the will. Then comes clause 18, which no doubt is a peculiar one, and is that on which the opinion of the Court is asked. It is said by The Mac Dermot and by Mr. Brunskill, that it is wholly repugnant and inconsistent with all that has gone before in the will, so much so that it must be struck out altogether. I rather think that it was in Mr. Brunskill's mind that there was another objection to it, namely, that it was illegal, and that there should be struck out of it those provisions which were contrary to law. Neither one nor the other of these courses has ever been adopted by a court of construction, unless it was absolutely compelled to do so. Lady Arnott's counsel admitted that the testator meant this clause to

(1) 2 My. & Cr. 309.

have effect. It is impossible to hold that it is illegal, if a legal construction can be given to it; and in the case of a very long and carefully prepared will it is almost equally impossible that any clause could be struck out, unless it is perfectly clear that it is impossible for it to stand along with the other provisions of the will. On that point, before I leave it, if this were the last clause, then the inference from the last argument would be that clause 18 must prevail, and that the previous clauses, so far as they were inconsistent with it, would have to give way; for although the rule on that point was often called by Sir George Jessel a "rule of thumb," still it is a rule of law that in the absence of anything else, if there is a complete inconsistency between two portions of a will, the latter portion must prevail. But Mr. Brunskill seeks to get out of that by shifting it on further, and saying, "here is another clause (19) which follows, and which is inconsistent with 18 also." If that were so, what the result of the confusion would be I do not venture to speculate. But it is clause 18 that I have to deal with, and before dealing with it I must remember that this is not the will of an illiterate man, but of a testator of the highest intelligence, who was dealing with an immense amount of property; and that wherever the will was prepared it certainly is most carefully settled and drafted, and it is not likely that on the face of it there would be in the testator's judgment or opinion any inconsistency between clause 18 and those that went before. Further, it is to be noted that though the testator did not live very long after the date of the will, he refers to the will in codicils, and in one of them he refers expressly to two clauses by number, showing that he had the will before him, and knew that he was confirming it. Now, what is clause 18?

"Provided always, and notwithstanding the trusts aforesaid, I hereby declare that so long as my son, John Alexander Arnott, shall be a trustee of this my will all the powers and authorities hereinbefore vested in my trustees with respect to or in connection with my property or the businesses or undertakings in which I may be engaged at my death shall be vested in and exercised by my said son solely as if he were the sole trustee of this my will, and he shall have the complete and uncontrolled power of management of and over all my property and business of every nature

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and kind, including appointment of managers, secretaries, agents, and all other officials of every kind, and shall have power to sell and buy in and vary the investments from time to time of my property and otherwise at his sole and uncontrolled discretion. And I hereby empower my said son to exercise all such powers and authorities without the concurrence of or any reference to his co-trustees. And I declare that, if my said son shall require to employ further capital for the purposes of the said businesses or undertakings, my trustees shall at his request raise such further capital out of my estate, and apply the same in such manner as he shall direct. I also direct that during such period as aforesaid my said son shall in respect of any shares in companies which may from time to time form part of the trust estate have the power of voting at meetings of the companies in which such shares are held as if such shares were vested solely in him."

No doubt this is a very unusual clause, and I do not recollect ever having seen any exactly like it; but apart from the question of its being unlawful, which is a different one, is there anything in it radically inconsistent with what has gone before? To my mind, it is plain that the testator had in his mind that he had given to his trustees very large and extensive powers; and he says, "during the lifetime of my son, he is to be the person to exercise these powers which are given to the trustees, and his discretion is to be binding on them, and, so far as their concurrence is required, they are to be bound to concur." There is nothing necessarily inconsistent between the two clauses. The second was no doubt a modification, and a very substantial and important modification during the lifetime of the present Sir John Arnott, of what the testator had previously done, but it is a modification by reference to what he had done before. It is confined to the son's lifetime, and is personal to himself; but, as I said to Mr. Brunskill, what more is it than making the present Sir John Arnott the acting trustee, and giving him the real power of an acting trustee, to do what happens without express directions where there is an active acting trustee and a slothful and easy-going one. That often occurs in practice; and I can quite understand Sir John Arnott may have thought that it was better that his son, who

was a business man, should exercise these very wide and important discretions, than that they should be shared by a lady not so well versed in affairs. That is, at any rate, in my opinion, what he has done; and I can see no repugnancy in it; it is a modification to last during the lifetime of Sir John Arnott. Nothing in this clause 18 can possibly survive him. After death that exclusive power is gone. But it is said that that is not the only objection to it, but that really it is repugnant at law, and that therefore it is a bad and invalid direction; that there being two trustees appointed, it is impossible for the testator to say that one of them is to have the larger power and to exercise it without the control of the other. Now, is that so? Take an instance. One of the powers given to the trustees here, is the power of executing leases for two or five hundred years it may be of the real estate. Would there be anything inconsistent with the appointment of the present trustees to say, for instance, that the leasing power is to be exercised by his son, John Alexander Arnott, and even against the wishes of his co-trustee? I only take that one power as a sample; and, if it can be done in the case of one, why should not it be done in the case of other powers? And, if so, if it can be done in some, there can be no legal objection to its being done in all. There is a difficulty arising in it in this way—that it would not be possible for him alone and without concurrence to exercise all the powers given, for the property is vested in the two trustees; it is actually devised to them so far as the real estate is concerned, and bequeathed to them so far as the personalty, and therefore it would be vested in them both. But, even so, if, for the purpose of exercising the powers and authorities, it became necessary to deal with the property vested in the joint names, my opinion is that it would be for him to dictate—(Mr. Brunskill objected to the milder word "request") what use should be made of it, and it would be the duty of the co-trustee to carry it out. I will not give any decision as to whether the co-trustee in thus joining with him would thereby incur any responsibility. That cannot be decided in this proceeding, the case not having arisen. But I may state that my own opinion at present is, though I do not decide it, that so far as the estate is concerned, Lady Arnott as trustee would incur no responsibility in obeying the directions of

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the testator, and in joining with her co-trustee on his direction; for the terms of the clause would, I think indemnify her. But as regards third persons, that of course would not apply, and, if it was conceived as at all probable or likely that any question of risk would arise, it would always be open to her to come to the Court to get discharged of the trusteeship, or to make any objection to joining in a transfer or anything whatever, and say, "I will not join in it, because I think that that is a thing that should not be undertaken." In either case I would hold that by her refusal to concur, or by taking the active step of coming to the Court, she could make herself safe. But, whether it was right or wrong, I have at present nothing to do with that. The testator said that his son is to be practically his *alter ego* in the management of the estate. There is nothing unlawful in that, and effect must be given to it in the answers I will give to the questions put to me. As to the only authorities cited, the passages from Bacon's Abridgment and Wentworth dealt with the old law as to executors. I do not propose to deal with that matter except as the testator has dealt with it. I give no opinion one way or other on that, or when in any particular transaction the office of executor ceases and that of trustee begins. My answer is confined to the case of a trustee simply. The case, I think, was a proper one to be brought into Court, and both parties are entitled to costs out of the estate. As to the questions asked in the plaintiff's summons, I shall answer them as follows:—

(1) Whether clause 18 of the will is invalid and void as being inconsistent with, contradictory, and repugnant to the other provisions of the will? It is not invalid nor void.

(2) Whether in case the said clause 18 is valid, its effect is to constitute the defendant, Sir John A. Arnott, the sole judge of all matters whatsoever relating to the administration of the estate and the carrying out of the trusts of the will, so as to bind the plaintiff to carry out without question any decision that he may arrive at with respect to all the trusts and powers conferred on the trustees by the will? The effect is to vest in Sir John A. Arnott the powers and authorities in the preceding parts of the will contained and conferred upon the testator's trustees as if he was sole trustee, so as to bind the plaintiff to carry out the decisions of the

defendant in respect thereof, arrived at in good faith. The Court declines to answer the remaining questions.

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Solicitors for the plaintiff: *Thornton & Son.*
Solicitors for the defendant: *W. G. Lane & Co.*

W. L.

IN THE MATTER OF THE ESTATE OF MARTIN JAMES D'ARCY, OWNER AND PETITIONER; CONTINUED IN THE NAME OF JANE CATHERINE D'ARCY, WIDOW AND DEVISEE OF THE WILL OF THE SAID MARTIN JAMES D'ARCY, OWNER.

Ross, J.
1898.
Dec. 13.
1899.
Feb. 20.

Fund in Court—Guarantee deposit—Annuity—Income insufficient to pay annuity in full—Sale of portion of guarantee deposit.

Lands which had been charged with a life annuity were sold in the Land Judge's Court to the tenants, under the Land Purchase Acts, discharged from the annuity, the only fund to answer which was the Guaranteed Land Stock, retained as a guarantee deposit by the Land Commission, the dividends on which, however, were not sufficient to pay the annuity in full:—

Held, that the annuitant was entitled to have portion of the Guaranteed Land Stock sold to make up the deficiency.

MOTION on behalf of Mrs. Jane Catherine D'Arcy, No. 11A on the Final Schedule of Incumbrances, for an order that she should be at liberty to sell as much of the sum of £1777 Guaranteed Land Stock, retained by the Irish Land Commission as guarantee deposit, "In the Matter of the Estate of Martin J. D'Arcy, continued in the name of Jane Catherine D'Arcy, widow and devisee of the will of the said Martin James D'Arcy, vendor of land," as would be sufficient to produce the sum of £58 13*s.* 10*d.*, the balance remaining due to her on foot of her annuity of £200 per annum, such sale of said stock to be realised on the basis that the said Guaranteed Stock would remain in the hands of the Land Purchase Commissioners until the Land Commission should declare that the guarantee deposit might be released, and that the said Irish Land Commission might be at liberty to place the

Ross, J. 1898. *In re* D'Arcy's Estate.

amount of said Guaranteed Land Stock, when so sold, to the credit of the said guarantee deposit and separate credit of the purchaser.

The facts of the case were shortly these:—

Mrs. D'Arcy was, under the terms of her marriage settlement, dated 18th December, 1879, entitled to an annuity or rentcharge of £200 per annum for her life, in full of all jointure and in bar of dower and thirds of the personal estate of her husband Martin J. D'Arcy. The lands in the matter were sold to the tenants under the Land Purchase Acts, through the Land Commission. The sale was made discharged of the annuity. By order of 9th November, 1896, Mrs. D'Arcy was declared entitled to be paid until further order, the dividends then due, and to accrue due on the sums of £498 cash and £1777 Guaranteed Land Stock, retained by the Land Commission as guarantee deposit, and she was given liberty to apply to the Land Commission for payment of such dividends. Under a ruling of Mr. Commissioner O'Brien, dated 31st March, 1898, dividends and interest on the said cash and guarantee deposit had been paid to her from time to time, but the same were insufficient to pay the jointure of £200, as they amounted to £61 13*s.* 8*d.* only, and the balance had been heretofore paid out of funds in the Land Judge's Court—which funds were then exhausted. The Land Commission had declined to release the guarantee deposit, and to transfer the Guaranteed Land Stock to the Land Judge's Court. The parties entitled to the guarantee deposit, subject to the annuity, were the unsecured creditors of M. J. D'Arcy, in an action of *D'Arcy* v. *D'Arcy* in the Vice-Chancellor's Court; and, by the directions of the Land Judge, special notice of this motion was served on the solicitors for the Hibernian Bank, as representing these creditors.

R. D. Murray, for Mrs. D'Arcy, in support of the application:—

The creditors have no interest in this fund, Mrs. D'Arcy is forty-four, and twenty years payment to her of the *corpus* from time to time would exhaust the entire fund. The annuitant has

a right to have recourse to the *corpus* if the income is insufficient: *In re Nicholson's Estate* (1), *Jeffreys* v. *Conner* (2).

Ross, J. 1898.

In re D'ARCY'S ESTATE.

Sheil, for the creditors in the action in the Vice-Chancellor's Court:—

This fund is tied up by statute. The sale could only be made at a discount of 40 per cent., which would come out of the pockets of the creditors. The arrears of the jointure could be accumulated.

Ross, J.:—

1899. Feb. 20.

The facts of this case are as follows:—Mrs. D'Arcy is entitled to an annuity of £200 per annum for her life, which was originally charged on the lands sold in this Court. By some strange irregularity several years ago, the lands were ordered to be sold, discharged of her annuity, without notice to her. The interest of the fund in Court is insufficient for the payment of her annuity. The only fund now available is guarantee deposit in the hands of the Land Commission. She asks that so much of this fund may be sold as will make up the balance due to her on foot of her annuity. This fund is not immediately payable—it remains in the hands of the Land Commission to meet a possible default in the payment of the instalments. It may never be paid at all. But subject, as it is, to this contingent liability, it is marketable. I am now asked to allow so much of it to be sold as will supply the deficit. It is contended, on the other hand, that the fund is tied up by statute, and is therefore not available for the satisfaction of the deficit. It is plain that, in the event of a terminable annuity not being paid in full out of the interest of the funds in Court, representing the land on which it was originally charged, the annuitant is entitled to go in on the *corpus*. Does it make any difference that the *corpus* in this case cannot be realised at its full price because it is subject to a contingent liability? I think not. It merely amounts to this, that the fund is less valuable than it would be if it were not subject to this contingent liability. Would it

(1) I. R. 11 Eq. 177. (2) 28 Beav. 328.

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be any argument against selling part of the *corpus* that there was a sudden fall in Government funds? I think not. The annuitant is entitled to payment, whatever may be the value of the stock at the time the deficit occurs. The same reasoning applies here, and I shall accordingly grant the motion, subject to this, that I must be satisfied that the portion of the guarantee deposit required to be sold, has been sold at its full value.

Solicitor for Mrs. D'Arcy: *Hugh V. Kennedy.*
Solicitors for the creditors: *D. & T. Fitzgerald.*

W. C. S.

JOYNT *v.* M'CRUM.

(1898. No. 1158.)

V.-C.
1899.
Jan. 16, 20.

Practice—Service out of jurisdiction—Injunction—Anything to be done within jurisdiction—Person out of jurisdiction proper party to action properly brought against other person served within jurisdiction—Order XI., Rule 1 (g) (h), Rule 2.

In an action against M., a vendor of cycles within the jurisdiction, and L. & F., cycle manufacturers in England, for an injunction to restrain the defendants from infringing in Ireland the plaintiffs' patent, and for damages, it appeared that L. & F. supplied M. with cycles having the article complained of as an infringement attached. The plaintiffs alleged that these cycles were sold by M. as agent for L. & F., while L. & F. alleged that the cycles were sold by them to M. for resale by him. L. & F. also alleged that the plaintiffs' invention had been anticipated and was not novel. M. had been duly served with the writ within the jurisdiction:—

Held, that the case came within both clause (*g*) and clause (*h*) of Order XI., Rule 1, and that an order giving leave to issue a concurrent writ, and to serve it on L. & F. out of the jurisdiction, had been rightly made.

Motion to discharge an order dated the 7th December, 1898, giving liberty to issue a concurrent writ and serve the same out of the jurisdiction.

The action was commenced on the 28th October, 1898, against William A. M'Crum, of 5, Leinster-street, Dublin, and Lea & Francis, Limited, having their registered offices at Coventry in Warwickshire, for an injunction to restrain the defendants and each of them from infringing in Ireland the plaintiffs' patent dated the 27th April, 1897, for damages for such infringement, and for all necessary accounts and inquiries.

The writ was served on M'Crum on the 3rd November, 1898.

On the 7th December, 1898, the Vice-Chancellor made an order giving liberty to the plaintiffs to issue a concurrent writ and serve the same upon Lea & Francis in England. That order was made upon affidavits by one of the plaintiffs stating, amongst other

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matters:—The patent had regard to an invention in reference to a new or improved method of attaching inflators to cycles; the provisional specification was dated the 26th April, 1897, the complete specification the 6th December, 1897; application for the patent was made on the 27th April, 1897; the complete specification was left at the Patent Office on the 8th December, 1897, and same was accepted on the 22nd January, 1898. M'Crum had been selling, either on his own account or as agent for Lea & Francis, at his shop in Leinster-street, inflator attachments for cycles, which were, as deponent believed, an obvious and palpable imitation of the said invention, and an infringement of the patent; those inflator attachments purported to be manufactured in Coventry by Lea & Francis, under patent dated the 26th October, 1897; the date of the complete specification of the said alleged invention and of the application was the 26th October, 1897, that of the acceptance the 22nd January, 1898. Lea & Francis were an English company of cycle manufacturers; the plaintiffs' invention being an Irish one, and the plaintiffs expecting a considerable sale in Ireland, they believed that the infringement in Ireland of their rights under their patent was calculated to do them great injury. The deponent believed that the defendants were necessary and proper parties to the action, which he was advised and believed was properly brought against M'Crum. M'Crum was, the deponent believed, the agent of Lea & Francis in Ireland, and professed to sell the various manufactures of that firm, including their alleged patent inflator attachments. The deponent referred to an illustrated catalogue of the said firm, obtained at M'Crum's shop, and stated that, from inquiries made, he believed that the firm had sent to this country for sale here by M'Crum, as their agent or otherwise, and through him had sold here, considerable quantities of the inflator attachments for cycles manufactured by them, and he believed that they intended to send more of such attachments to this country for sale here, and he had himself seen attachments as above purporting to have been manufactured by Lea & Francis in the possession of persons in Dublin who had purchased same at M'Crum's shop.

The catalogue, which contained a drawing (amongst others) of the attachment complained of, was stamped on the outside with

the words "William A. M'Crum, Cycle Agent, 5, Leinster-street, Dublin."

Lea & Francis now moved to discharge the order of the 7th December, 1898.

The application was grounded on an affidavit of one of the Managing Directors, which stated amongst other things:—Lea & Francis carried on business as cycle manufacturers at Coventry, and at Piccadilly, London, and not elsewhere, and sold their machines both to private individuals and cycle agents and factors throughout the whole of the United Kingdom and abroad: among the cycle agents or factors to whom they sold machines was M'Crum, to whom they were in the habit of selling machines for resale by him; according to the ordinary custom of the cycle trade, M'Crum described himself as agent of Lea & Francis, but was only agent in this respect that goods were sold to him by them and he was allowed a special trade discount in respect thereof; he was not in any other sense of the word an agent of theirs, and had not power or authority to act for them in any manner in Ireland or elsewhere. The deponent discovered what he thought was a new method of attaching air pumps or inflators to velocipedes about April or May, 1897, and at the time he had no idea that the said method was not new, and he had not seen, and had not had an opportunity of becoming acquainted with the plaintiffs' method. He proceeded to perfect his invention and prepared the draft specification, but as it was not intended to bring the same out until the following season, he did not take steps to patent it until the 11th October, 1897, when he sent the specification to his patent agents, who lodged same on the 26th October, 1897. After the papers had been sent to the agents, he heard that the plaintiffs had applied for provisional protection in respect of an invention for a similar purpose, and he asked G. I. Francis who was then going to Ireland, to see the plaintiffs thereon, and he was informed the said G. I. Francis saw one of the plaintiffs, and being satisfied that their invention was practically identical with that of the deponent, it was arranged that if Lea & Francis were satisfied of the validity of the plaintiffs' patent, they should take out a license. In the spring of 1898, having received a complaint from one R. F. Hall, who claimed to be sole licensee of the plaintiffs,

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the deponent caused search to be made and found that the plaintiffs' patent had been anticipated by prior patents: he therefore declined to take any license, considering that the plaintiffs' invention was not novel, and that the defendants were entitled to use same: Lea & Francis proceeded to make cycles with this method of attachment of inflators affixed, and to make and supply the said attachments, and continued to sell and were still selling the same throughout the whole of the United Kingdom. If the action went to trial, the defendants would have to examine a large number of experts all resident in England, and any patent experts to be called by the plaintiffs would also, he believed, be resident there: Lea & Francis had no place of business in Ireland, and no agents or representatives there. The affidavit charged that the plaintiffs had no substantial cause of action against M'Crum, and had named him as a defendant solely with the view of enabling the Court to give leave to serve Lea & Francis in England.

An affidavit by one of the plaintiffs, in reply stated that they intended to examine a number of witnesses resident in Dublin as to the infringement of the patent, and expert witnesses also resident in Dublin, including patent agents and practical mechanics: it denied that it was with the object alleged that M'Crum was made a defendant: G. I. Francis called on the deponent on the 26th October, 1897, and showed him a pump attachment of similar nature to plaintiffs, and the deponent then told him that the plaintiffs had obtained protection many months before, and were making arrangements for working the patent under license: G. I. Francis asked if plaintiffs would grant a license to his firm, and deponent said he would do so, and no mention was then made of the validity of the plaintiffs' patent.

Campbell, Q.C. (with him *Pim*), in support of the motion:—

If M'Crum is not the agent of his co-defendants he is not a *bona fide* defendant at all. It is necessary to have regard to Rule 2 of Order XI. An injunction could not be enforced against Lea & Francis themselves, and the order should be discharged: *Marshall* v. *Marshall* (1). In *Burland* v. *Broxburn Oil Company* (2)

(1) 38 Ch. D. 330. (2) 41 Ch. D. 542.

the defendants had places of business and property in England, and were there selling the articles complained of, and an injunction could have been enforced against them in England by sequestration; the case was an English case, and the balance of convenience was in favour of proceedings in England: see the judgment of Chitty, J. *Kinahan* v. *Kinahan* (1) is directly in point. Here the injunction is the real relief sought, and M'Crum is not an agent. In *Marshall* v. *Marshall* (2) there was no doubt the defendant was selling in England, and in that case and in *Kinahan* v. *Kinahan* (1) there was other litigation going on in that country between the same parties and in reference to the same questions: see also the judgment of Kekewich, J., in the latter case on the question of convenience.

Badische, &c., Fabrik v. *Henry Johnson, &c.* (3) has no bearing on the present case: there was there a *prima facie* sale by the foreign defendants within the jurisdiction, and the order was an *ex parte* one expressly stated by Lindley, L.J., to be liable to be discharged, and the question of comparative cost and convenience did not then arise.

O'Shaughnessy, Q.C., and *A. E. R. Joynt*, for the plaintiffs:—

Here the English defendants, with full knowledge of the plaintiffs' patent, and after having actually applied for a license to use the same, manufacture an article similar to plaintiffs' invention and in violation of their rights, and send it to this country. Their catalogue contains a drawing of that article: this catalogue is supplied to M'Crum, and published through him in this country with his name stamped thereon as agent; and the affidavit filed on behalf of these defendants actually states that they have continued to sell, and are still selling, their attachments throughout the whole of the United Kingdom. In *Marshall* v. *Marshall* (2) both parties were Scotchmen residing in the same town, the articles were made in Scotland, and the case was in all respects a Scotch case. *Kinahan* v. *Kinahan* (1) was essentially an Irish case. *Badische, &c., Fabrik* v. *Henry Johnson, &c.* (3) is much nearer the present; the very point in question here arose in that case—one

(1) 45 Ch. D. 78.
(2) 38 Ch. D. 330.
(3) [1896] 1 Ch. 25.

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defendant was within the jurisdiction. A judgment in this action can be enforced against the English defendants: *Tozier* v. *Hawkins* (1). We claim damages and costs, which could be enforced in England under the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54). There is a clear case against M'Crum. The case comes under both clauses (*g*) and (*h*) of Rule 1 of Order XI. [Reference was also made to The Annual Practice, 1899, 602, and 41 Geo. 3, c. 90.]

Pim, in reply.

THE VICE-CHANCELLOR:—

In this case the action is brought for the purpose of restraining the defendants—a Mr. M'Crum, who describes himself as a cycle agent, and who is alleged to be selling in this country bicycles containing an invention of some part of these machines which has been patented by the plaintiffs, and Messrs. Lea & Francis, Ltd., a company of manufacturers outside the jurisdiction—from infringing in Ireland the plaintiffs' patent.

The priority of the plaintiffs' patent, for the present, must be assumed by me, though it will be the real question for trial, namely, whether the plaintiffs' patent was a new discovery. At the present stage, however, it must be assumed that it was a good patent, and prior to that obtained by the defendant company. The defendants say that they themselves had arrived at the discovery of the invention, whatever its merits are, independently, but that they let the matter lie over, and that in the meantime the plaintiffs' patent was completed, and duly registered. They had full knowledge of the plaintiffs' invention, as it appears that one of their firm came to Ireland and called upon one of the plaintiffs and entered into negotiations with him for a license to manufacture and use the plaintiffs' invention, thus admitting the plaintiffs' priority. Therefore, with knowledge of that priority this company proceeded to manufacture cycles into which they introduced this patented invention, and to send them to this country for some purpose. Mr. Lea says they sent them over

(1) 15 Q. B. D. 680.

because they were bought from the firm by M'Crum in England, and were merely delivered to him as the purchaser in Ireland. I am not satisfied that this is an accurate statement of the relationship between those parties. However, the machines which the plaintiffs allege to be infringements, were sent over to this country and catalogues or prospectuses were prepared, with descriptions of them as manufactured by Lea & Francis. The catalogues or prospectuses were sent by them to this country, and M'Crum describes himself on the face of them as "Cycle Agent, W. A. M'Crum."

The defendants Lea & Francis allege that M'Crum was not for these purposes the agent of Lea & Francis, that the catalogue or prospectus merely intimates that these articles are to be bought at his shop in Leinster-street; but they continue to supply the articles in infringement of the plaintiffs' rights, and M'Crum, who has held himself out as the agent of the other defendants, makes no affidavit in explanation. That may be a device adopted to prevent the Company being sued in this country.

The question then arises, whether this is a case in which I am justified under the Rules of Court in allowing service out of the jurisdiction, and whether I was right in making the order now sought to be set aside.

Order XI., Rule 1, gives power to allow service out of the jurisdiction whenever (*g*), any injunction is sought as to anything to be done within the jurisdiction . . . whether damages are or are not also sought in respect thereof. The injunction sought in the present case is against the selling within the jurisdiction articles in violation of the plaintiffs' patent, to the sole right of manufacture of which the plaintiffs claim to be entitled. I am of opinion that this comes within the rule, and that the injunction sought is as to something to be done within the jurisdiction.

I am also of opinion that this is a case to which the last clause (*h*) applies, viz. where any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction. There can be no doubt that the action is properly brought against M'Crum here, and as far as he is concerned no case can be made except upon the merits. If it is established that there is an ordinary

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agency between the parties the action would be properly brought against the Company—if they are selling within the jurisdiction through M'Crum as their agent. It will be a matter for the trial, whether they are so doing, and may well be raised in this action. I therefore consider that I had jurisdiction to make the order complained of.

Another question is whether I ought to exercise that jurisdiction—the words of the rule are "Service out of the jurisdiction . . . *may* be allowed"—and whether this is a case in which service out of the jurisdiction should be allowed. If the Company are selling through M'Crum, within the jurisdiction, I have no doubt the service ought to be allowed—it is done by him as their agent. If he is not their agent, the action may be dismissed as against the Company. Therefore I should not prevent the plaintiffs joining the Company as defendants.

Now as to the adequacy of the remedy, I am not certain that there are not some means of enforcing an injunction in England, if it were granted here, but even assuming that a judgment for an injunction, if obtained by the plaintiffs in this case, could not be enforced against the Company, there is another claim made in this action, viz., one for damages, in respect of which a substantial amount may be awarded, and the claim for damages cannot be considered merely as an adjunct to that for an injunction, any more than the claim for the injunction can be regarded as merely ancillary to that for damages; and a judgment for damages can undoubtedly be enforced in England.

The claim for costs is another matter, but I do not say that I should treat the fact that a judgment for costs could be executed in England as influencing me in deciding the case.

On the grounds I have stated, I refuse the motion with costs.

Solicitor for the plaintiff: *Lane Joynt.*

Solicitors for Lea & Francis: *Goodbody & Tisdall.*

D. M'C. M.

V.-C. 1899. Feb. 13

IN THE MATTER OF A CONTRACT FOR THE SALE OF LAND, DATED THE 28TH OCTOBER, 1898; AND IN THE MATTER OF THE VENDOR AND PURCHASER ACT, 1874. ANDREW J. M'CLURE, VENDOR; SARAH GARRETT, PURCHASER.

(1899. No. 102.)

Vendor and Purchaser—Sale of farm—Conditions of sale—Vendor to show twelve years undisturbed possession—Prior title not to be objected to—Grant of administration to vendor—Return of farm as assets—Objection of purchaser.

G. was declared the purchaser of a leasehold farm, the subject of a judicial tenancy, which was sold by public auction. By the conditions of sale the vendor was required to show that he had been in the undisturbed possession of the lands for upwards of twelve years, and prior to that period the title was not to be investigated, nor any objection or requisition made in reference to it. From 1879 the vendor had been admittedly in absolute possession, but in 1897 he took out letters of administration to his father, and returned the farm as part of his assets. The purchaser becoming aware of this refused to complete.

The vendor having taken out a summons under the Vendor and Purchaser Act:—

Held, that the taking out of letters of administration to his father by the vendor, after the acquisition by him of an absolute title under the statute, could not have any greater effect than an acknowledgment in writing would have; that such an acknowledgment could not be relied on by the next-of-kin to revive a right in the case of land, where the right itself was barred by the statute, and not merely the remedy for enforcing it; and that consequently a good title was shown so far as was required by the conditions of sale.

ON the 28th October, 1898, Sarah Garrett was declared the purchaser of a farm of lands, which was sold by public auction, situated at Clontnacally, in the county Down, and containing 18 acres, statute measure, for the sum of £310. The farm was stated to be held under the Marquis of Downshire, and was sold

V.-C. 1899.

In re M'CLURE AND GARRETT'S CONTRACT.

subject to certain conditions, which contained amongst others the following: "The vendor Andrew J. M'Clure has been in the actual undisturbed possession and occupation of the lands and premises as tenant for upwards of twelve years, and the prescriptive title acquired by him, and now vested in him, will be conveyed to the purchaser. The title prior to the said prescriptive period of twelve years shall not be investigated or inquired into by the purchaser, nor shall any objection or requisition in reference thereto be made. A statutory declaration by the vendor that he has been in the aforesaid undisturbed possession and enjoyment of the lands and premises for the said period of twelve years, together with a copy of the order of the Irish Land Commission (dated 24th March, 1890), fixing the fair rent of said lands and premises in the name of the vendor, shall be handed to the purchaser, and no other document of title shall be asked for by the purchaser or given to him, and the right and title of the said Andrew J. M'Clure to execute the said assurance shall be admitted, and no investigation of the prior title of any description shall be given or required."

Robert M'Clure, the father of the vendor, was at the date of his death in possession of the farm as tenant from year to year under the Marquis of Downshire. He died on 18th July, 1871, intestate, leaving his widow Margaret M'Clure, Andrew J. M'Clure, and four other children alive at the time of his death. After the death of her husband, Mrs. M'Clure, without obtaining any grant of administration, remained on in possession of the farm until 1879, when she died. On her death Andrew J. M'Clure (the vendor), went into possession and continued in occupation up to the present time.

By an agreement dated 24th March, 1890, made between the trustees of the Marquis of Downshire, as landlords, and Andrew J. M'Clure as tenant, and filed in the office of the Irish Land Commission on 30th June, 1890, pursuant to the Land Law (Ireland), Act, 1881, it was agreed that £12 3*s.* should be the fair rent of the holding.

On the 4th October, 1897, letters of administration of the personal estate of Robert M'Clure were granted to Andrew J. M'Clure, the vendor, and the schedule of assets, verified by him

for the purpose of obtaining the grant, included the farm now agreed to be sold, which was valued at £62.

The purchaser, becoming aware of this, objected to the title on the ground that the vendor, having admitted that the farm formed part of the assets of Robert M'Clure, was not entitled to the entire beneficial interest in the farm by an undisturbed occupation for a period of twelve years preceding the sale, and could not dispose of it as the absolute owner.

M'Ilroy, for the purchaser:—

We submit that the vendor has not shown a good title to the farm. The conditions of sale require him to show that he has acquired a prescriptive title by having been twelve years in undisputed possession, but in 1897 he has made a declaration that he is in possession as administrator. Time runs against an administrator claiming a chattel interest in land from the date of the death of the intestate, and not from the date of the grant of administration: *Davies* v. *Williams* (1). The vendor cannot therefore now rely on occupation. We are not precluded by the conditions of sale from raising this question. For a condition to be binding on a purchaser, it must disclose all material facts within the knowledge of the vendor: Fry on Specific Performance 513; *In re Marsh and Earl Granville* (2). The vendor is estopped from denying that he is in possession as administrator, and as such he holds for the benefit of the next-of-kin: *In re Johnson* (3); *Eady* v. *Wood* (4).

Chambers, for the vendor:—

After taking out administration, the vendor purported to sell by public auction, as administrator of his father. The same solicitor represented the purchaser, and raised the same objection. Therefore the purchaser had full knowledge of what she now relies on as a ground for refusing to complete.

If the vendor had recovered possession by using his representative character, the statute would run from the time the grant of

(1) 34 Ch. D. 558.
(2) 24 Ch. D. 11.
(3) 29 Ch. D. 964.
(4) 29 I. L. T. R. 70.

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administration was actually recovered, and in *Re Johnson* (1) and *Eady* v. *Wood* (2) would apply. But the present is an entirely different case. Here the vendor has had sole and undisputed possession since the death of his mother in 1879, and has therefore acquired an indefeasible title as against the next-of-kin before taking out administration. Does the fact of his taking administration in 1897 divest him of that title, and make him a trustee for the next-of-kin? In the case of land, the statute does not merely bar the remedy, but extinguishes the right. Once the right of the next-of-kin is gone, no acknowledgment will revive it: *Sanders* v. *Sanders* (3); *In re Alison* (4); *Brassington* v. *Llewellyn* (5); *Rankin* v. *M'Murtry* (6); *Scott* v. *Nixon* (7).

M'Ilroy, in reply:—

Mere possession of land does not give a title. The vendor must show he was in possession as of right, which he cannot do if he acknowledges himself to be a trustee for the next-of-kin.

The purchaser had no knowledge of the previous sale.

The Vice-Chancellor.

The facts of this case are very short. The original owner of this farm died intestate in the year 1871, and after his death the vendor and his mother remained on in possession until she died in 1879. From that time the vendor has been in sole possession of this property which he has now agreed to sell.

Under the Statute of Limitations he would have acquired an absolute title to the lands, by reason of his having been in undisputed possession of them for twelve years and upwards from 1879. I am of opinion that the taking out administration afterwards cannot affect the title so acquired under the statute. I cannot see that it could have any greater effect than an acknowledgment in writing would have, which could not be relied on to revive a right in the case of land, where the right itself is barred by the statute, and not merely the remedy for enforcing it.

(1) 29 Ch. D. 964.
(2) 29 I. L. T. R. 70.
(3) 19 Ch. D. 373.
(4) 11 Ch. D. 284.
(5) 27 L. J. Exch. 297.
(6) 24 L. R. I. 290.
(7) 3 Dr. & War. 388.

Even if this were not so, I think the purchaser would be precluded by the conditions of sale from raising any question in reference to it.

Therefore, I am of opinion that no valid objection has been raised by the purchaser, and accordingly I hold that a good title has been shown by the vendor so far as is required by the conditions of sale.

Solicitor for the purchaser: *Wellington Young.*
Solicitor for the vendor: *M'Connell.*

J. MACM.

USBORNE *v.* THE LIMERICK MARKET TRUSTEES.

(1898. No. 274.)

Market — Mortgage of tolls — Commissioners Clauses Act, 1847 (10 *Vict.* c. 16) *s.* 75—*Priority—Receiver—Judgment in Queen's Bench Division—Sums received under equitable execution.*

The trustees of the Limerick market were empowered by local Act (15 Vict. c. civ.), with which was incorporated the clauses with respect to mortgages of the Commissioners Clauses Act, 1847, to raise money on mortgage of the rents and tolls of the market. By section 75 of the Commissioners Clauses Act the mortgagees were entitled to their respective proportions of the rates and assessments or other property comprised in such mortgages, according to the sums advanced, and to be repaid the sums advanced without any preference by reason of priority of advance or date of mortgage. The market trustees borrowed £20,000 secured by a mortgage deed in the ordinary form, with covenant for repayment. They also borrowed further sums secured by a series of mortgage deeds in the form prescribed in Schedule (B) to the Commissioners Clauses Act. Several of these mortgage deeds became the property of the plaintiffs, and the mortgage for £20,000 became vested in an insurance society. The society brought an action in the Queen's Bench Division against the market trustees on the covenant in the mortgage deed, and recovered judgment, and obtained an order for a receiver by way of equitable execution over the tolls of the market, pursuant to which order the tolls were paid to them. Subsequently the plaintiff brought this

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action on behalf of himself and his co-mortgagees against the market trustees and the insurance society for an account, and for a receiver, and to have the priorities of the several mortgagees ascertained.

Held, that the plaintiff and the other mortgagees were entitled to be paid *pari passu*, and that the insurance society was not entitled to retain the tolls paid to them under the receiver order in the Queen's Bench Division proceedings, although such order had been obtained before any proceedings were commenced by the plaintiff.

MOTION FOR JUDGMENT.

This action was brought on March 16th, 1898, by Thomas Usborne against the Limerick Market Trustees, John Hardiman, their secretary, and the Economic Life Assurance Society, for the appointment of a receiver and manager of the undertaking of the Limerick Market Trustees, and the rents, tolls, rates, and customs arising therefrom; for an account of all sums received by the Economic Life Assurance Society from such rents, tolls, rates, and customs out of their due priority; and for an account of what was due to the plaintiff and his co-mortgagees on account of their respective mortgages, and to have the respective priorities of the said mortgagees ascertained. The material facts, as set out in the statement of claim, delivered on May 24th, 1898, were as follows:

By the Limerick Markets Acts, 1852 (15 Vict. c. civ., loc. & pers.), the Limerick Market trustees were incorporated, and were empowered to borrow at any rate of interest not exceeding £5 for every £100 by the year on mortgage of the lands, works, rents, and tolls thereby authorised to be purchased, hired, appropriated, or taken, or of any property which might be vested in the said trustees by virtue of the said Act any sum or sums of money not exceeding in the whole the sum of £30,000 for the purposes of the said Act, and from time to time to pay off and re-borrow the same or any part thereof, but so as that there should not be due at any one time under the present power more than the principal sum of £30,000.

By the said Act the several provisions of the Commissioners' Clauses Act, 1847, with respect to the mortgages to be executed by the Commissioners, were made applicable to all mortgages to be executed by the trustees in the same manner to all intents and purposes as if they were re-enacted in the said Act, and the works,

rents, and tolls were inserted therein, wherever the same might be necessary, to effectuate the object of the said provisions.

The said market trustees were thereby authorised to construct market places, and to take and levy the rents and tolls specified in the schedule to the said Act, and it was further provided that all moneys arising from the rents and tolls to be levied and taken as aforesaid, and all moneys to be borrowed on mortgage, and all moneys which should come to the hands of the trustees under the Act, should be applied as and for the purposes in the said Act mentioned.

By the Limerick Markets Act, 1862 (25 Vict. c. xxiii., loc. & pers.), the trustees were authorised to borrow on mortgage of the said lands, works, rents, and tolls vested in them under the said Act of 1852, any sum or sums of money not exceeding £10,000 in addition to said sum of £30,000 authorised to be borrowed by the said Act of 1852.

The same provisions of the Commissioners' Clauses Act, 1847, with respect to the mortgages to be executed by the Commissioners, were incorporated with the said last-mentioned Act; and it was thereby further provided that all mortgages on lands granted by the trustees under the authority of the Act of 1852 should have priority over all mortgages granted by the trustees under the authority of said last-mentioned Act.

By ten several mortgage deeds dated respectively the 20th day of June, 1855, and numbered respectively 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, for £500 each, the trustees under the said Act of 1852 granted the said lands, works, rents and tolls by way of mortgage to Thomas Masters Usborne, now deceased, to secure the repayment of £500 in respect of the said mortgages, making together £5,000, with interest at the rate of £5 per cent. per annum; and by one other mortgage dated 20th October, 1869, and numbered 34 also under the said Act of 1852, the market trustees granted the same lands, works, rents and tolls to the said Thomas Masters Usborne by way of mortgage to secure £300, with interest at £5 per cent. per annum.

By a mortgage dated the 17th November, 1858, the said market trustees, under the powers given to them by the said Act of 1852, granted the said lands, works, rents and tolls to the

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Economic Life Assurance Society, by way of mortgage, to secure £20,000, with interest at £5 per cent. per annum.

The plaintiff believes that the said market trustees granted further mortgages under the powers given to them by the said Act of 1852, to various persons for the purpose of raising the residue of the sum of £30,000 authorised to be borrowed under said Act of 1852.

The said market trustees also raised by various mortgages the sum of £10,000 which they were authorised to borrow under said Act of 1862, and amongst others they mortgaged the said lands, works, rents and tolls by two several mortgages dated respectively the 1st May, 1868, and the 20th October, 1869, and respectively numbered 11 and 12, to Thomas Masters Usborne, to secure the repayment of £500 and £200, with interest at £5 per cent. per annum.

The said Thomas Masters Usborne died on the 10th of October, 1883, having by his will appointed the plaintiff one of his executors and also his residuary legatee, and as such the plaintiff is now entitled to the said several mortgages which were granted to the said Thomas Masters Usborne, and to the moneys thereby secured. Probate of the said will was on the 28th November, 1883, granted to the plaintiff and Raymond Maude Llewellyn, the other executor (who has since died), and the said plaintiff from that time until the order of the 9th September, 1897, hereinafter stated, was in receipt of the interest payable in respect of the said mortgages.

On the 12th April, 1897, the defendants, the Economic Life Assurance Society, recovered a judgment in the Queen's Bench Division against the defendants, the Limerick Market Trustees, for the sum of £19,443 7*s.* 9*d.*, alleged to be due for principal and interest on foot of the said mortgage of the 17th November, 1858, with £11 3*s.* 6*d.* for costs, and £460 17*s.* 1*d.*, having been paid to the said defendants, the Economic Life Assurance Society, by the Limerick Market Trustees on the 21st May, 1897, on the 9th September, 1897, the Economic Life Assurance Society, without disclosing the fact that there were other persons, including the plaintiff in this action entitled to mortgages upon the said lands, works, rents, and tolls in equal priority with them, applied for and obtained in the said Queen's Bench Division an order

appointing the defendant, John Hardiman, receiver on behalf of the Economic Life Assurance Society by way of equitable execution over the beneficial interest of the defendants, the Limerick Market Trustees, in the said rents, tolls, and customs to the extent of, and to answer in payment of, the said judgment debt recovered by the Economic Life Assurance Society, as therein mentioned.

Since the said order the said John Hardiman has been in receipt of the said rents, tolls, and customs, and has paid and applied the whole of the same after necessary outgoings in and towards the payment of the claim of the Economic Life Assurance Society alone, contrary to the provisions of the said Acts, and has not paid any of the moneys realised from such rents, tolls, rates, and customs to the plaintiff or any of the other persons, who and whose mortgages are in equal priority as charges on the said lands, rents, tolls and customs.

The plaintiff herein, on the 16th May, 1898, applied in the said Queen's Bench Division in the said action of the Economic Life Assurance Society against the Limerick Market Trustees, for an order either that the said John Hardiman should be discharged as such receiver, or that he should, as receiver, be extended to the claim of the plaintiff herein, and that it should be referred to the Master of the said Division to settle the priorities of the charges on the rents, tolls, and customs of the Limerick Markets, and that the said John Hardiman should be ordered to pay and keep down the interest on such mortgages and charges, in accordance with their priorities, as the same should be found by the Master; and the Court, on the hearing of the said application, was pleased to order that the further hearing thereof should stand over until 10th June, pending an application to this Court in this action for the appointment of a receiver over such rents, tolls, and customs, and that the plaintiff herein, Thomas Usborne, should be at liberty to apply to this Court, in this action, for the appointment of a receiver, notwithstanding the appointment of the said John Hardiman as receiver by the said order of the 9th September, 1897.

The Economic Life Assurance Society put in a defence on June 13, 1898, admitting the above facts, and stating that, while they were willing that a receiver should be appointed, and that the said rents, tolls, and customs should from the date of his appoint-

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ment be applied by him *pari passu* in discharge of all principal moneys and interest due in respect of their mortgage and the several mortgages which might be held to be in equal priority therewith under the Limerick Markets Act, 1852, and in proportion to the amounts due on foot of the said mortgages respectively, they submitted that they were entitled to retain all moneys paid to them by the receiver appointed by the said order of September 9, 1897. No defence was put in by the other defendants. On June 14, 1898, the defendant John Hardiman was appointed receiver.

On June 21, 1898, an order was made by the Queen's Bench Division in the said action by consent, rescinding the said order of September 9, 1897, and discharging the said receiver, and directing that the costs of the motion should be dealt with by the Master of the Rolls in this action.

On July 6, 1898, the action was set down for hearing on motion for judgment on admissions against the Economic Life Assurance Society, and against the other defendants in default of defence, and came on for hearing on July 9, 1898. The debentures held by the plaintiff and the mortgage to the Society were produced at the hearing. The debentures were in the form following :—

"LIMERICK MARKETS ACT, 1852.

"£500 *Mortgage No.*

"BY virtue of the 'Limerick Markets Act, 1852,' We, the Limerick Market Trustees, in consideration of the sum of five hundred pounds sterling paid by Thomas Masters Usborne of Clifton, Co. Cork, Esquire, for the purposes of the said Act, DO grant and assign unto the said Thomas Masters Usborne, his executors, administrators, and assigns, the said undertaking, and the rents, tolls, and other moneys arising by virtue of the said Act, and all our estate, right, title, and interest in the same, TO HOLD unto the said Thomas Masters Usborne, his executors, administrators, and assigns, until the said sum of five hundred pounds together with interest for the same at the rate of five pounds for

every one hundred pounds by the year be satisfied, the principal sum to be repaid at the end of five years from the date hereof.

"Given under our common seal this twenty-second day of June, one thousand eight hundred and fifty-five (1855).

"Witness to seal of the Limerick Market Trustees.

"WILLIAM CARROLL, *Secretary.*"

[*Seal of Limerick Market Trustees.*]

The mortgage to the Society was in the form of an ordinary mortgage deed, made between the Limerick Market Trustees of the one part and William Routh and others, trustees for the Society, of the other part. It contained the usual covenant for repayment of £20,000 and interest at 5 per cent. per annum. This sum was advanced by the Society to enable the Market Trustees to pay off two mortgages of £10,000 each, made in the years 1853, 1854, respectively, which were assigned to the Society by deeds of even date.

E. Morphy, for the plaintiff:—

The Companies Clauses Consolidation Act, 1847, section 75, provides that the mortgagees shall be entitled to their respective proportions of the rates or other property comprised in the mortgages according to the respective sums advanced, and to be repaid such sums with interest, without any preference one above another by reason of priority of advance or date of mortgage. The Society, therefore, being in the same priority with the plaintiff, cannot put itself in a better position. If the Society relies on the order of the Queen's Bench Division appointing a receiver by way of equitable execution, that order only attached the equitable interest of the trustees after satisfying incumbrances, and the Society was not entitled to apply the rents collected under it in payment of interest due to it in priority to the plaintiff and his co-mortgagees. The affidavit on which the receiver order was granted

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contained no mention of other mortgages. In *Kennett* v. *Westminster Improvement Commissioners* (1) it was held that a bondholder could not attach a debt due to the Commissioners, as the effect of the garnishment would be to give him a priority over the other bondholders. In *Bowen* v. *Brecon Railway Co.* (2), which was decided under the Companies Clauses Act, 1845, which is for this purpose identical with the Commissioners Clauses Act, 1847, it was held that a debenture-holder was not entitled to issue execution otherwise than as a trustee for himself and all other debenture-holders entitled by the special Acts, to be paid *pari passu* with himself. In *In re Potteries, Shrewsbury, and North Wales Railway Co.* (3) it was held that a debenture-holder was only one of a class, and none the less a member of it because he had obtained judgment. In that case the debenture-holder was ultimately restrained from proceeding with his execution, though at first the application was refused as no bill had been filed by the company. In *The Imperial Mercantile Credit Association* v. *Newry and Armagh Railway Co.* (4) the distinction between the rights of mortgagees and bondholders under the Companies Clauses Act, 1845, is pointed out. It was there held that bondholders of a railway company were not entitled to have a receiver appointed over the tolls of the company; so also in *Holland* v. *Cork and Kinsale Railway Co.* (5) it was decided that a judgment mortgagee who had obtained a receiver over a railway had no right to be paid the profits of that railway in priority to the interest due on mortgages and debentures of the company.

The receiver order should never have been made: *Walmsley* v. *Mundy* (6); *Campion* v. *Palmer* (7); *O'Connor* v. *Ireland* (8). The plaintiff does not press to have the money refunded, but only to have an adjustment of accounts.

W. M. Jellett, for the defendant Society:—

The rescinding of the order of the Queen's Bench Division does not affect the rights of the defendants, as it was agreed that

(1) 11 Ex. 349.
(2) L. R. 3 Eq. 541.
(3) L. R. 5 Ch. 67.
(4) Ir. Rep. 2 Eq. 524.
(5) Ir. Rep. 2 Eq. 417.
(6) 13 Q. B. D. 807.
(7) [1896] 2 Ir. Rep. 445.
(8) [1897] 2 Ir. Rep. 150.

they should be decided in this Court. The defendants did not oppose the appointment of a receiver in this action, as they admitted that every debenture holder or mortgagee was entitled to be paid equally from the time he intervened, but they submit that they were entitled to the benefit of the order of the Queen's Bench Division until the other parties intervened. The opinion of Christian, L. J., in *The Imperial Mercantile Credit Association* v. *Newry and Armagh Railway Co.* (1) supports this view; he there says: "The rational mode of giving effect to the non-priority clause would seem to be to let it operate after the bondholders came into competition, but not to the undoing of past transactions," and adopts the opinion of Wood, V. C., in *Fountaine* v. *Carmarthen Railway Co.* (2), which was a case of debentures, that the money once received could not be brought back. In the cases relied on for the plaintiff it will be found that something had been done by or on behalf of all the debenture holders before the individual creditor took action. *Bowen* v. *Brecon Railway Co.* (3) was questioned in *In re Potteries, Shrewsbury, and North Wales Railway Co.* (4), by Giffard, L. J.: see also Simmonson on Debentures, p. 119.

If the contention of the plaintiff is correct, the covenant for payment in the defendants' mortgage has no operation whatever. The right to sue on the covenant in such a case was recognized in *Eastern Union Railway* v. *Hart* (5).

Walmsley v. *Mundy* (6) was not a case of equal priority like the present, but one where the mortgage was prior to the right of the judgment creditor to get anything by his equitable execution. In *Campion* v. *Palmer* (7) the right of the puisne mortgagee to capture the rents till interfered with was recognised. *O'Connor* v. *Ireland* (8) is distinguishable. There before the conditional order for a garnishee was made absolute, the Board of Works obtained a receiver in the Chancery Division.

The form of mortgage in the schedule to the local Act is a conveyance of the whole undertaking, not of a proportionate part;

(1) Ir. Rep. 2 Eq. 543.
(2) L. R. 5 Eq. 324.
(3) L. R. 3 Eq. 541.
(4) L. R. 5 Ch. 67.
(5) 8 Ex. 123.
(6) 13 Q. B. D. 807.
(7) [1896] 2 Ir. Rep. 445.
(8) [1897] 2 Ir. Rep. 150.

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section 26 of the same Act provides for the appointment of a receiver, and accordingly the provisions of sect. 86 of the Commissioners Clauses Act, 1847, are applicable.

Chaytor, for the defendant Hardiman.

Morphy, in reply.

July 21.

THE MASTER OF THE ROLLS:—

[The Master of the Rolls having stated the nature of the action and the facts as set forth in the statement of claim proceeded as follows:—]

There is, of course, no question but that, apart from any particular Act of Parliament, a puisne mortgagee who has obtained a receiver before a prior mortgagee has taken possession or otherwise intercepted the rents of land, is entitled to retain the fruits realised by his diligence. By extending the receiver, or otherwise, the prior incumbrancer can obtain the benefit of his priority, but only from the date of his so intervening. The reason is that till the first mortgagee intervenes, it is to be presumed that he is content to allow the rents to be received by the mortgagor or his assigns. He may be looking for payment from other sources, or he may be indifferent about the matter. The puisne creditor, in either case, can retain what his receiver obtains, so long as he is allowed to obtain it, and cannot be compelled to give up anything so received. This is the case as to ordinary mortgages; and Mr. Jellett put it, if there be two or more ordinary mortgages which by contract have the same priority, must not the same result follow? It is, however, difficult to fancy two or more independent ordinary mortgages in exactly the same priority: one will have the legal estate, and the other will follow in order of execution or of registration. But this is not the case of ordinary mortgages at all. It is that of securities if not created, yet regulated, by statutory authority. An ordinary owner of land may mortgage it for as much as he can induce lenders to advance. Not so the companies or public bodies in question. The amount of their debentures, mortgages, or bonds is strictly limited, with, it must be presumed, some reference to their supposed means or prospects of repayment. The

non-priority clauses both in the Companies Clauses' Act and in the Commissioners Clauses' Act, were intended to prevent any one of the securities from obtaining an advantage over any other. While, therefore, a mortgage debenture constitutes a debt on which the Company can be sued with the ordinary consequences of judgment and execution, there would be no inconsistency if it were the fact that such judgment and execution were to be operative only against property not comprised in the security, or at least not pledged to the holders of the other co-ordinate securities, or so far only as would not interfere with their rights.

Let us, then, consider the language of the Act, for it is upon the very words which the Legislature has used that the question must depend. The section of the Commissioners Clauses Act, 1847 (10 Vict. c. 16, s. 75) says :—"Every mortgage of rates or other property authorised to be made under the provisions of this, or the special Act, shall be by deed duly stamped, in which the consideration shall be duly stated, and every such deed shall be under the common seal of the Commissioners, if they be a body corporate, or if they be not a body corporate, shall be executed by the Commissioners, or any five of them, and may be according to the form in the schedule (B) to this Act annexed, or to the like effect; and the respective mortgagees shall be entitled one with another to their respective proportions of the rates and assessments or other property comprised in such mortgages, according to the respective sums in such mortgages mentioned to be advanced by such mortgagees, and to be repaid the sums so advanced, with interest, without any preference one above another by reason of the priority of advancing such moneys, or of the dates of any such mortgages."

The prescribed form (B) is in strict accordance with the section and is an assignment of "such proportion of the rates, rents, profits, &c.," not of the whole. The words of the form is as follows: "By virtue of [here name the Special Act], we [here name the Corporation if the Commissioners be incorporated, or if not incorporated, five of the Commissioners] appointed in pursuance of the said Act, in consideration of the sum of
paid to the treasurer to the said Commissioners by A. B. of
for the purposes of the said Act, do grant and assign unto the

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said A. B., his executors, administrators, and assigns, such proportion of the rates, rents, profits, and other moneys arising or accruing by virtue of the said Act from [here describe the rates or other property proposed to be mortgaged] as the said sum of shall bear to the whole sum which is to be borrowed upon the credit of the said rates, rents, profits, or moneys, to hold to the said A. B., his executors, administrators, and assigns, from this day until the said sum of with interest at per centum per annum for the same, shall be fully paid and satisfied [the principal sum to be repaid at the end of years from the date hereof] [in case any period be agreed upon for that purpose]."

In this respect the mortgages under the Commissioners Clauses Act, 1847, differ in form from those under the Companies Clauses Act, 1845, though section 75 of the former Act corresponds pretty closely with section 42 of the latter. Section 42 is as follows:—

"The respective mortgagees shall be entitled one with another to their respective proportions of the tolls, sums, and premises comprised in such mortgages, and of the future calls payable by the shareholders, if comprised therein, according to the respective sums in such mortgages mentioned to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference one above another by reason of priority of date of any such mortgage, or of the meeting at which the same was obtained." The form of mortgage prescribed in Schedule (C) assigns to the mortgagee the undertaking and all the tolls and sums of money arising by virtue of the Act. Sect. 44, which deals with the rights of bondholders, is as follows:—"The respective obligees in such bonds shall, proportionably according to the amount of the moneys secured thereby, be entitled to be paid out of the tolls or other property or effects of the Company, the respective sums in such bonds mentioned, and thereby intended to be secured, without any preference, one above another, by reason of priority of date of any such bond, or of the meeting at which the same was authorised, or otherwise howsoever."

This gives to the bondholders the right to be paid out of the whole of the property of the Company. Section 36 gives a remedy

against shareholders in the event of any execution against the Company being fruitless.

The Limerick Market Act, 1852, section 25, enacts that "every mortgage authorized to be made under the provisions of this Act shall be by deed under the common seal of the said trustees, duly stamped, and in which the consideration shall be duly stated, and may be respectively according to the form in Schedule A to this Act annexed, or according to the form in Schedule B to the Commissioners Clauses Act, 1847, annexed, or to the like effect respectively." By the form in Schedule A the trustees grant and assign to the mortgagee "the said undertaking, and the rents, tolls, and other moneys arising by virtue of the said Act, and all their estate, right, title, and interest in the same, until the said sum of pounds, with interest for the same at the rate of for every one hundred pounds by the year, be satisfied."

This alternative is peculiar, but as the two Acts are incorporated, the circumstance that a mortgage "may be" in one form or the other indicates that whichever is used the effect is the same, and the non-priority clause governs both. The form in the local Act may possibly have been meant for the case of there being only one mortgagee.

But however that may be, it is clear that each mortgage under section 42 of the Act of 1845, or section 75 of the Act of 1847, is entitled to its own share, its aliquot part, of the tolls and rates, as its own security. If, then, one mortgagee obtains judgment, and seizes under it, say, all the tolls for a year, he does no more, perhaps, so far as the Company is concerned, than he is entitled to do, at least the Company has little right to complain. But as concerns the other mortgagees, he is possessing himself of their property, of a security specifically pledged to them, and in which the Company has no beneficial interest whatever until they are paid.

Doubtless the judgment is good, but the execution against this property is bad. In the present case, where the execution was in the form of a receivership order, the order appointed the receiver over the "beneficial interest" of the defendants in the tolls. They had no beneficial interest whatever in the tolls till the mortgagees were paid, if even then; and it is trite law that a

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judgment creditor cannot under his judgment seize what is not the debtor's. He can only take, as the order says he is to have, the beneficial interest of the Company.

The order of the Queen's Bench Division of June 21, 1898, rescinded the order of September, 1897. I do not suppose that meant that the latter order was held to be illegal. It appears indeed that nothing was decided except that, as this action was pending here, it was better to have the whole matter determined by the same tribunal, and for that end, to get the order of September, 1897, out of the way. It is clear, however, that to that extent it must operate, and I am free to do what seems right and lawful, as if the whole matter was before me for the first time, and unprejudiced by the appointment of the receiver. I think this is what the learned Judges of the Queen's Bench Division intended, otherwise they would have merely discharged the receiver as of the date of June 21, 1898. But in the result, and having regard to the terms of the earliest order, which appointed Mr. Hardiman receiver over the beneficial interest of the defendants in the tolls, and that only, I think that the receipt by him of any part of the tolls in excess of the aliquot part to which the security of the Economic Life Assurance Society entitled them was wrong, because it belonged to the other creditors rateably.

How stands the case in point of authority? *The Eastern Union Railway Company* v. *Hart* (1), has no bearing whatever upon the present question. It decides no doubt that where a company incorporated by statute has power to borrow money on mortgage for specified purposes by instruments, which, apart from the provisions of the statute, would import a covenant to repay the money borrowed, the lender may maintain an action, recover judgment, and issue execution against the company. That is not in controversy here; for the question is not whether an action may be maintained, but whether by process of execution upon the judgment in the action the statutory rights of other similar creditors can be interfered with. No question of priorities arose in *The Eastern Union Railway Company* v. *Hart* (1).

In *Bowen* v. *The Brecon Railway Company* (2), a question arose

(1) 8 Ex. 116. (2) L. R. 3 Eq. 541.

closely resembling that involved in the present case. Vice-Chancellor Sir W. Page Wood there says:—"This petition raises a question which, as far as I am aware, has never been expressly decided before—namely, whether a creditor of a railway or of any other company, being the holder of a mortgage in the statutory form of a debenture of the company, is entitled to sue out execution on a judgment which he has obtained at law, in an action on the same instrument after a bill has been filed" (I emphasise these words) "by all the holders of mortgage securities of the same class, and a receiver appointed in that event. It is obvious that if a debenture holder be held to be so entitled, it will lead to great inconvenience; but, nevertheless, the exact legal position of a creditor under such circumstances has to be considered before any decision upon such petition as this can be arrived at."

It will be observed that the question stated by the learned Vice-Chancellor is in terms referable to cases where the judgment has been obtained *after* a bill filed by all the mortgagees and a receiver appointed. I shall recur to this point, as it constitutes the sole ground of distinction between that case and the one before me. But Mr. Jellett challenged the case altogether, because it was questioned by Lord Justice Giffard in *Re The Potteries, Shrewsbury, and North Wales Railway Company* (1). That case turned upon the effect of a scheme under the Railway Companies Act of 1867, and therefore has no direct authority bearing upon the present case, but at p. 69 of the report, occurs the following passage:—"The Lord Justice referred to *Bowen* v. *Brecon Railway Company* (2) in which it was held by the present Lord Chancellor, then Vice-Chancellor, that a debenture holder who issued execution could only do so as a trustee on behalf of himself and the other judgment creditors, and said that, if the same question was involved in the present case, he should wish it to be heard by the full Court in order that the principle of that decision might be reconsidered." This is a mere query, and one to which undue weight ought not to be attached. It is the observation of one learned Judge, sitting alone, upon the decision of one as eminent as himself, and as the Lord Justice had himself unsuccessfully argued *Bowen* v.

(1) L. R. 5 Ch. 67. (2) L. R. 3 Eq. 541.

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The Brecon Railway Company (1), his view may not have been entirely free from preconception. It is at most a judicial query, and *Bowen* v. *Brecon Railway Company* (1), has been recognised in many subsequent cases. But the main ground on which the bearing of *Bowen* v. *The Brecon Railway Company* (1) was disputed, was that to which I have referred, viz., that there the receiver for the general body of debenture holders was appointed first. Here the particular debenture creditor obtained judgment, execution and receiver before the present suit was instituted. But Lord Justice Giffard in the passage I have quoted, in *Re Potteries Company* (2) points out that the decision in *Bowen* v. *Brecon Railway Company* (1) was "that a debenture holder who issued execution could only do so as a trustee on behalf of himself and the other judgment creditors" (the word "judgment" is probably a mistake for "debenture") and it will be found that the reasoning of Sir W. Page Wood proceeds entirely on the ground that the debenture holders before him were mortgagees, coming within section 42 of the Companies Clauses Act, and not mere bond creditors under section 44. At page 548 he says:—"As to the bonds, it is only necessary to refer to them with regard to one particular point. They are mentioned in the 44th section in a different manner. Bondholders are not assignees of the undertaking and tolls, they are only declared to be 'entitled to be paid out of' the tolls, or other property in the manner stated. As to bonds, I apprehend the present question could not arise, because a bond is a thing only to be secured by a judgment, unless a special receiver be appointed under the Act; and it would clearly be against the words of the section to say that, when a judgment is the only remedy of a bond creditor, any bond creditor is to be preferred to another in respect of his judgment. The mortgage is a mortgage only of the tolls and sums of money arising by virtue of the Acts. By their Act the company has power (though they are not compelled to do so) to run engines and to keep rolling stock for that purpose. They had also power to take tolls up to a specific amount, and I take it, all the sums they were authorized by virtue of their Act to receive passed by the mortgage. The

(1) L. R. 3 Eq. 541. (2) L. R. 5 Ch. 67.

recent decision of the Lords Justices in *Gardner* v. *London, Chatham, and Dover Railway Company* (1), shows that all the debenture holders can claim is the actual fruit, resulting from the carrying on of the business of the company—namely, the tolls, rates, and duties, which may be earned by the company through their availing themselves of their privilege of becoming carriers, and the rent which may be paid by other companies for the use of their line. In that state of things a receiver having been appointed on behalf of all the debenture holders, the petitioner is in all respects in the same position as others in the same class. Having obtained a judgment I apprehend that, according to the decision in *Russell* v. *East Anglian Railway Company* (2), if he had been a simple contract creditor and not a mortgage creditor affected by the provisions of the 42nd section, he would have been entitled to levy on the rolling stock and any other chattels of the company, which are not indispensably necessary for fulfilling the purposes of the Act. It appears to me the carrying business is not one that is indispensably necessary for the purposes of the Act, it is only a power, and not a thing which the company by their Act are necessarily bound to do." He then disposes of an argument based on the difference in the language of the 42nd and 44th sections, and deals with the consequences which would follow if the mortgage creditor were allowed, by reason of the priority of his judgment, to obtain the security in question, and continues thus:—"Therefore, if I were to hold that a mortgage creditor, holding one of these securities, was entitled, as soon as he could recover judgment, to get priority over all the other creditors, the consequence would be, that he would be held entitled to be paid as the Act says he shall not be paid; for the Act expressly says, that these mortgage creditors shall be repaid the sums advanced with interest, without any preference in respect of priority of date. But if the mortgage creditor were entitled to levy execution, he would gain such preference, for the first set of mortgages would ripen into action, so as to enable an action to be brought before the second set of mortgagees could bring any action."

Now as I have shown that section 75 of the Commissioners

(1) L. R. 2 Ch. 201. (2) 3 M'N. & G. 125.

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Clauses Act is the same (practically) as section 42 of the Companies Clauses Act, a decision of the former is applicable to the latter, while decisions on section 44 are not. To the same effect is *Kennett* v. *The Westminster Improvement Commissioners* (1) so far as it goes. In *The Imperial Mercantile Credit Association* v. *The Newry and Armagh Railway Co.* (2), Lord Justice Christian in the Court of Appeal in this country in the course of a long judgment used some language on which the defendants strenuously rely. The case was not one of mortgages, but of bonds, not under section 42, but under section 44 of the Act of 1845. This is the vital point, and it will be found that the whole argument of the learned Lord Justice turned upon this: he says, at p. 543—"Moreover, I am not convinced that the difficulties argued by counsel have any real existence. I do not concede that if one of these bondholders takes his own separate proceeding, by judgment and execution or judgment mortgage, that everything which he gets he must divide with all the other bondholders. If the company had paid him voluntarily I suppose it would not be contended that he could be called upon to refund any part of it; and I do not see why the same principle should not apply to what he gets by his execution before any other intervenes. The rational mode of giving effect to the non-priority clause would seem to be to let it operate after the bondholders came into competition with each other, but not to the undoing of past transactions. Let it be remembered that the priority spoken of in the 44th section is not priority existing by the bond, but priority to be acquired by execution—priority not between bonds, which are not charges at all, but between executions. In this I am fortified by the high authority of Vice-Chancellor (now Lord Justice) Wood, in *Fountaine* v. *Carmarthen Railway Co.* (3). Counsel had there contended that, according to recent decisions, a judgment debenture creditor who issued and levied his execution must be treated only as a trustee for himself and all other the debenture holders. On this, Wood, V.-C., says:—'Without departing from that view, I may say this, that where the thing is done, the money is paid, and the debenture creditor has gone away with it, he cannot be brought back again, and I

(1) 11 Ex. 349. (2) Ir. Rep. 2 Eq. 524. (3) L. R. 5 Eq. 324.

must treat the transaction just the same as if the company had taken it out of their own cashbox and paid him.' Therefore the difficulties which are said to drive the debenture holder to a suit on behalf of himself and all the others appear to be imaginary." But all this is applicable, as it is applied, only to cases of bondholders, and not at all to mortgagees under the Act; and indeed, when rightly understood, the decision proceeds upon grounds which are in favour of the plaintiff and not the defendants here. The Lord Justice says, at p. 535, after referring to the 42nd and 44th sections:—"Observe the significant difference of language between the two sections, and how clearly it shows that the Legislature never lost sight of the essential difference between the two instruments. In the one, the mortgagee's right is described as his right to his proportion of the tolls and other property comprised in his mortgage, *i.e.* a present vested right in that specific property. In the other the bondholder's right is described as a right 'to be paid' at some future time out of the general means of his debtor. The priority excluded in section 42 is a priority coeval with the instrument; the priority excluded in section 44 is a priority between the making of the instrument and the time of payment, *i.e.* by going to judgment and execution"; and in numerous other passages which I have not time to quote, the same leading idea appears, and indeed it may well be asked (as I did ask during the argument without receiving any satisfactory reply) what can be the meaning of the words of section 42 of the Act of 1845, and of section 75 of the Act of 1847, as to the proportional part of the tolls, if they do not mean, as Lord Justice Christian says they mean, "a present vested right in the specific property." He also quotes with approval *Bowen* v. *The Brecon Railway Co.* (1). At p. 540 he says:—"But it is not only that, but whenever the matter is found coming up incidentally, we find Judges of the highest authority re-affirming Lord Truro's doctrine. Thus in *Bowen* v. *The Brecon Railway Co.* (1) we have the dictum of V.-C. Wood; 'As to the bonds, they are mentioned in the 44th section in a different manner' (*i.e.* different from the way mortgages are mentioned in the 42nd). Bondholders are not assignees of the

(1) L. R. 3 Eq. 541.

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undertaking and tolls; they are only declared to be 'entitled to be paid out of' the tolls or other property, in the manner stated. A bond is a thing only to be secured by a judgment, unless a special receiver be appointed under the Act."

In fact I do not think that a clearer exposition of the fundamental distinction between such railway debentures as are mortgages, and such as are bonds, can be found in any of the books.

If the 75th section was intended to give a nominal and not a real non-priority, the words of the section apportioning the security amongst the charges upon it are absolutely meaningless and only calculated to mislead.

The plaintiff is entitled to succeed in the action, and must have a decree in the terms of the prayer of the statement of claim.

Solicitors for the plaintiff: *T. F. O'Connell & Sons.*

Solicitors for the Economic Life Assurance Society: *Barrington & Son.*

Solicitors for John Hardiman: *Montgomery & Chaytor.*

W. L.

V.-C. 1898. Dec. 12.

RICHARDSON *v.* MURPHY.

(1898. No. 1247.)

Landlord and tenant—Land Law (Ireland) Act, 1881, *sect.* 5, *sub-sect.* 6—*Prohibition against sale of intoxicating liquor on holding—Off-licence—Breach of statutory condition—Interlocutory injunction.*

The statutory condition contained in the Land Law (Ireland) Act, 1881, sect. 5, sub-sect. 6, prohibiting the tenant from opening on his holding, without the consent of his landlord, any house for the sale of intoxicating liquors, applies to a licence for the sale of liquors to be consumed off, as well as on, the premises; and an injunction will be granted to restrain him from so doing.

The plaintiff was the owner of the farm and lands of Carrickcloughan in Armagh, containing 14A. 2R. 28P. together with the

dwelling-house and offices thereon, which were held by the defendant under a judicial tenancy at the yearly rent of £6 6*s*.

On 27th September, 1897, the defendant applied to the Justices at Ballybot Sessions in Armagh, and obtained a licence to sell spirits by retail to be consumed elsewhere than on the premises, without the knowledge or consent of the landlord.

Section 5, sub-section 6, of the Land Law (Ireland) Act, 1881, provides as follows, viz:—"The tenant shall not on his holding, without the consent of his landlord, open any house for the sale of intoxicating liquors." Section 13, sub-section 3, provides "that proceedings shall not be taken by a landlord to compel a tenant to quit his holding for breach of any statutory condition save as follows:—(*a*) where the condition broken is a condition relating to payment of rent, then by ejectment, subject to the provisions of the statutes relating to ejectment for non-payment of rent; and (*b*), where the condition broken is any other statutory condition, then by ejectment founded on notice to quit."

The landlord, having brought an action against the tenant to restrain him from continuing the sale of intoxicating liquors as aforesaid, applied to the Court for an interlocutory injunction.

Gordon, Q.C., for the plaintiff:—

Once a fair rent has been fixed on a holding, the statutory conditions become attached to the contract of letting, and the tenant amongst other such conditions cannot, without the consent of his landlord, open any house on his holding for the sale of intoxicating liquors. An injunction lies to restrain the breach of a statutory condition: *Steele* v. *Tiernan* (1).

Wylie, Q.C. (with him *Cusack*), for the defendant:—

The sale of spirits to be consumed off the premises is not a breach of the statutory condition prohibiting the tenant from opening any house on his holding for the sale of intoxicating liquors. In the Licensing Act, 1872 (35 & 36 Vict. c. 94, ss. 78, 86) the words "open any house for the sale of intoxicating liquors" are confined to the sale of liquor for consumption upon the premises. A covenant not to use a house as a beer-house is not

(1) 23 L. R. I. 583.

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broken by the sale of beer by retail to be consumed outside the premises: *London & North Western Railway Co.* v. *Garnett* (1). Similarly where the grantee of building land covenanted not to use a site as an hotel, tavern, public-house or beer-house, or carry on the trade of publican or beershop keeper, or seller by retail of spirituous liquors, the Court declined to interfere by injunction to restrain a grocer from selling in the course of his trade wine and spirits in bottle: *Jones* v. *Bone* (2).

Even assuming there is a breach of the statutory condition, the equitable jurisdiction should not be invoked. There is a distinction between *Steele* v. *Tiernan* (3) and the present case. *Steele* v. *Tiernan* (3), was a case of waste, where before the Land Act the landlord could have come in and claimed equitable relief; but here the right was first conferred on the landlord by the Land Act of 1881, which provides a statutory remedy, namely, notice to quit. The landlord should pursue his legal remedy.

Gordon, Q.C., in reply:—

If the statute created an offence and pointed out the remedy, the case would be different. But the Act of 1881 merely points out a course which the landlord may adopt, if he chooses, and does not limit him in any way as regards any other remedy he may have. The statutory conditions have the same effect as if they were express covenants in a lease. If a tenant held under a lease containing as express covenants the statutory conditions and also a clause of re-entry and forfeiture in the event of a breach of a condition, in such a case the landlord would not be restricted merely to his right of re-entry, but would have in addition all his usual remedies.

THE VICE-CHANCELLOR:—

In this case I am of opinion that the statutory conditions imposed by the Act of Parliament are imported for all purposes into every contract of letting, to which the Act applies, precisely in the same manner as if they were so many covenants contained in a deed. The Act imposes, among others, a condition prohibiting

(1) L. R. 9 Eq. 26. (2) L. R. 9 Eq. 674. (3) 23 L. R. I. 583.

the tenant from opening, without the consent of his landlord, any house upon his holding for the sale of intoxicating liquors. It is contended that what has taken place in this case does not amount to a breach of this statutory condition, because the tenant's licence is for the sale of spirituous liquors to be consumed off the premises. I think, however, that the words of the statute are wide enough to include a licence for the sale of liquors off as well as on the premises, and that this was what the Legislature contemplated when it imposed this salutary condition. But then it is argued that the Act itself, in case of the breach of a statutory condition, provides a special remedy, and that therefore the plaintiff is deprived of his right to relief by injunction. In this respect I think the case falls within the spirit of what was decided in the authority cited by Mr. Gordon, and that the remedy pointed out by the statute is a cumulative remedy, and was not intended to interfere with what I hold to be the contract between the parties. I agree with the argument that has been pressed by Mr. Gordon, that the position is similar to that of a tenant holding under a lease which contains as express covenants all these statutory conditions, and over and above that a clause of re-entry and forfeiture in the event of a breach of a condition, and that the landlord in such case would not be restricted merely to the exercise of his right to re-enter, but would have all the ordinary remedies to enforce the terms of the contract.

On these grounds I hold that the plaintiff is entitled to an injunction to continue until the trial of the action.

Solicitor for the plaintiff: *Mullan.*
Solicitor for the defendant: *Fisher.*

J. MAC M.

V.-C. 1899. Feb. 8, 9.

THE BLACKSTAFF FLAX-SPINNING AND WEAVING COMPANY, LIMITED *v.* CAMERON.

(1898. No. 1155.)

Company—Shares—Death of Shareholder—Unregistered assignee—Acts of ownership—Shareholder by estoppel—Executor de son tort—Liability for calls on shares.

J. C., sen., being the owner of certain shares in the plaintiff Company shortly before his death assigned by deed all his property, including the shares, to his son J. C. (the present defendant), subject, however, to payment of his debts. The Company continued after the death of J. C., sen., of which they alleged they had no notice, to address the usual shareholders' notices as before, namely, to "J. C., Ballymoney," and the dividend warrants were drawn in favour of J. C. The defendant, in his evidence, admitted that he had received these dividend warrants, the first of which he endorsed as "J. C., assignee of J. C., sen.," but he alleged that he had devoted the proceeds to the payment of his father's debts. He further admitted that, since his father's death, he had attended a meeting of shareholders, and moved a resolution. He also stated that, after the meeting, he showed the deed of assignment to one of the directors, and asked to be registered as a shareholder, but that this request was refused on the ground that the deed did not comply with the articles of association. The Company made calls on the shares, which the defendant refused to pay.

The present action having been instituted by the Company to recover the amount of the calls due on foot of the shares:—

Held, that the Company were aware that the defendant was not the registered owner of the shares, and had themselves refused to register him as such; that, consequently, the defendant was not estopped by any conduct on his part from denying that he was a registered shareholder, and that therefore he could not be made personally liable for the payment of the calls; that as executor *de son tort* the defendant was also not liable for such payment *de bonis propriis*, but was only liable for the administration in due course of the assets that actually came to his hands.

The plaintiff Company was incorporated under the Companies' Act, 1862, in the year 1866, with a memorandum and articles of association, and with a nominal capital of £100,000, divided into

2000 shares of £50 each. These shares, so far as allotted, were in July, 1898, paid up to the extent of £15 per share.

The defendant's father James Cameron of Ballymoney was the registered holder of 123 shares in the Company. Shortly before his death, which occurred on the 6th August, 1886, he executed a deed, dated the 27th July, 1886, whereby he assigned to his son James Cameron, junior, all his property, including these shares, subject, however, to the payment of his debts. The Company alleged that no notice of the death of James Cameron, senior, was ever served upon them, and since that date they continued to address the usual shareholders' notices in the same manner as before, viz. to "James Cameron, Ballymoney," and all the dividend warrants were drawn in favour of James Cameron.

On the 18th April, 1888, the secretary of the Ulster Bank wrote to the Company, informing them that they held, and had held for some years past, the scrip of the shares registered in the name of James Cameron of Ballymoney, then deceased, and requesting the Company not to permit the shares to be dealt with in any way by the representative of the deceased, or by any other person without their permission. The contents of this letter were shortly afterwards communicated to the defendant by the plaintiffs.

In his evidence, given at the trial, the defendant admitted that in January, 1889, he had attended a meeting of shareholders, and moved a resolution. He further stated that, when the meeting was over, he showed the deed of assignment of the 27th July, 1886, to Mr. Boyd, senior, one of the directors (who was unable to be present at the trial and was not examined), and asked to be registered as a shareholder; but that Mr. Boyd refused his request on the ground that the deed did not comply with the requirements of the articles of association. He also admitted that from the time of his father's death he received the dividend warrants, the first of which he endorsed as "James Cameron, assignee of James Cameron, senior." He claimed, however, to have devoted the proceeds to the payment of his father's debts, whose estate had proved insolvent.

The articles of association contained among others the following provisions:—

"The directors may, from time to time, make such calls upon

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the members in respect of all money unpaid on their respective shares as the directors think fit, subject to the following restrictions, namely:—No call (beyond the sum of £5 per share payable on application and allotment) shall be made to mature till the expiration of two months from the incorporation of the Company, nor shall any call exceed £5 per share, and at least two months shall intervene between the times appointed for the payment of two successive calls.

"Notice in writing of the making of a call shall be served on every member liable to pay the amount of the call twenty-one days, at least, before the day appointed for payment thereof.

"If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder, for the time being, of such share shall be liable to pay interest on the amount of the call at the rate of £10 per cent. per annum, or such lower rate as the directors may determine, from that day until payment.

"Every person who by operation of law, transfer, or otherwise, becomes entitled to any share, shall be bound by every notice or other document which, before he shall have been entered upon the register of members in respect of the share, shall have been served on the person from or through whom he derives his title.

"Where any notice or document shall have been served in accordance with these articles, then notwithstanding the person for whom the notice or document shall be intended shall be then deceased, and whether or not the Company have notice of his decease, such service of the notice or other document shall, for all purposes of these articles be deemed good service thereof, as against his heirs, executors, and administrators."

In exercise of these powers conferred on them by the articles of association the directors made, on the 11th May, 1898, two calls on the shareholders, amounting respectively to £5 per share, the first call to be payable on the 4th July, 1898, and the second on the 4th September, 1898, and notice of these calls was forwarded to James Cameron, Ballymoney. The defendant refused to pay these calls, which amounted to the sum of £1230, together with interest on the sum of £615, part thereof at the rate of 10 per cent. from the 4th July, 1898, the day appointed for the payment

of the first of the calls, and with interest on the balance at the same rate from the 4th of September, 1898, the day appointed for the payment of the second of the calls.

The plaintiffs' case was that the defendant had become liable as assignee of James Cameron, senior, for the amount of the calls, notwithstanding that the name of James Cameron was originally inserted on the register of shareholders as the name of James Cameron, senior; and further, that the defendant was estopped by his conduct from denying that he was a registered member of the Company; or in the alternative, that the defendant having intermeddled with the assets of James Cameron, senior, was liable as executor *de son tort*.

Serjeant Dodd (with him *Ronan, Q.C.*, and *Pigot*), for the plaintiffs:—

The defendant received the dividend warrants after his father's death, and appropriated them to his own use. The first cheque was endorsed by him as assignee of James Cameron, senior, which goes to show that he was in fact the beneficial owner of the shares. The Company allowed him to receive the money and to attend a meeting of the shareholders and move a resolution. Therefore the estoppel is mutual. In equity the defendant must be deemed to be a shareholder. No doubt the deed of assignment did not comply with the requirements of the articles of association, but the performance of conditions and formalities required by statute or articles of association may be dispensed with where, as in the present case, a person has acted and has been treated as a shareholder by the Company. In such a case both the person himself and the Company are estopped from denying that he is a shareholder: Lindley on Companies, pp. 46–49; *The Barrow-in-Furness Mutual Ship Insurance Co.* v. *Ashburner* (1); *In re British Farmers' Pure Linseed Cake Company* (2).

The principle is also recognized in *The Irish Peat Company* v. *Phillips* (3), where, however, it was held on the particular facts of the case that the defendant was not estopped by his conduct.

(1) 5 Asp. Mar. Cas. 527. (2) 7 Ch. D. 533. (3) 1 B. & S. 598.

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BLACKSTAFF FLAX CO. v. CAMERON.

Matheson, Q.C. (with him *W. H. Brown*), for the defendant :—

In order to recover the amount of the calls from the defendant personally the Company must show that they are proceeding against a registered member of the Company. They took no steps, however, to make the defendant a shareholder. The mere fact that a person attended a meeting and moved a resolution does not estop him from denying that he is a shareholder. If any fraud or deception had been practised by the defendant the case might be different; but it has not been suggested that there has been any such conduct on his part. There is no reported case where a person, whose name is not on the register has been held to be a shareholder in equity, unless he has entered into an agreement which can be specifically enforced.

As executor *de son tort* the defendant cannot be made personally liable for the payment of the calls, but is only liable to the extent of the assets that actually came to his hands. But whatever assets he has received, he has devoted to the payment of his father's debts, whose estate has proved insolvent.

Feb. 9.

THE VICE-CHANCELLOR :—

In this case the plaintiffs are proceeding to recover calls on shares which are admittedly unpaid, and they base their action on two grounds, presenting aspects which are entirely different. In the first place they seek to make the defendant responsible, as if he were a registered member of the Company; and to prevent their being met by the fact that his name does not appear upon the register of shareholders, they say that the defendant is nevertheless liable, by reason of a course of conduct on his part and a mode of dealing by him with the shares, which preclude him from denying that he is a registered shareholder, and liable to pay the calls. Upon the second or alternative ground the plaintiffs contend that the defendant is liable as executor *de son tort* of his father, and that he accepted in that capacity a liability in respect of the shares which the plaintiffs can now enforce against him.

Now it is clear to my mind that the person on the register was James Cameron, senior. Shortly before his death, being anxious to dispose of his property, he executed a deed bearing date the

27th July, 1886, by which he purported to convey in general terms the whole of his property to James Cameron, junior, including these shares, subject, however, to the payment of his debts.

It is clear that the plaintiffs were aware of the facts of the case. They knew very well that the shares were originally the property of James Cameron, senior, and that he was dead, and that the deed had been executed by him to James Cameron, junior. It has been proved that the person known to be the owner of the shares was the father and not the son. The son was never registered as a shareholder, and the clear and precise provisions in the articles of association dealing respectively with the way shares are to be acquired and transferred were not complied with. I think that the fact that James Cameron, junior, was never registered as a shareholder precludes the plaintiffs from recovering the amount of the calls from the defendant personally.

But then it is contended that there has been a course of conduct on the part of the defendant which precludes him from denying that he is a shareholder.

Now, in the first place, if anything turns on the question of conduct, it is an important feature that this is not a case of a shareholder wishing to practise any fraud or deception. The acts which the plaintiffs rely on are that the defendant on several occasions received from the Company cheques payable to James Cameron as the person entitled to the dividends on these shares. But he got them without practising any fraud or deception on the Company or any other holder of shares. The defendant, in 1889, called at the office of the Company, and attended a meeting of shareholders. He produced the deed to Mr. Boyd, who unfortunately was not able to be present here, and asked to be registered as a shareholder, and stated the deed as his authority for making the application. Mr. Boyd refused to register him and returned him the deed, which was not accepted or acted upon. I am of opinion that after their refusal to make him a shareholder when the shares were valuable they cannot now treat him as a shareholder when the value of the shares has fallen. On these grounds, I am of opinion that the defendant is not precluded by any conduct on his part from denying that he is a

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BLACKSTAFF FLAX CO. *v.* CAMERON.

shareholder, and that therefore he is not personally liable for the payment of calls.

As regards the other ground put forward by the plaintiffs, I am of opinion that on this ground also no liability attaches to James Cameron, junior, personally on foot of the shares. The shares remained the property of James Cameron the elder, and his name is on the register, and his assets are liable for the payment of calls. But it is contended that James Cameron, the defendant, took possession of the assets of his father in such a way as to constitute him executor *de son tort*, and render him liable for the calls *de bonis propriis*. But as executor *de son tort* he is only liable for the administration in due course of administration of assets that actually came to his hands. If the plaintiffs desire to take an administration account against the defendant they may go on and do so; but possibly they may find that they will gain nothing by such a proceeding. If the plaintiffs do not desire to take the course I have indicated, I shall dismiss this action with costs.

Solicitors for the plaintiffs: *L'Estrange & Brett.*
Solicitor for the defendant: *White.*

J. MAC M.

CRAIG *v.* GREER.

(1897. No. 880.)

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May 12.
June 4.

Appeal.
Nov. 24, 25.
Dec. 16.

Lease for building purposes — Restrictive covenant — Purchase of reversion by lessee—Merger—Sub-lessees—Notice of restrictive covenant—Infringement—Change in the character of the neighbourhood—Waste—Injunction.

By lease dated the 15th February, 1854, the Earl of R. demised certain lands near Belfast to W. T., for the term of 1000 years at a yearly rent, and subject, among others, to a covenant on the part of the lessee to expend within three years a sum of £500, at least, in erecting a private dwelling-house on portion of the said demised premises, and a further covenant not to use or allow to be used any house then erected or thereafter to be erected on any part of the demised premises, save for a private dwelling-house or tea and refreshment house, without the consent in writing of the Earl of R. A sub-lease dated 25th December, 1863, was made by W. T. of a portion of these premises containing 2R. 23P., on which a villa residence had been erected called Seville Lodge,

to Arabella G. (one of the defendants) for a term of 800 years, subject, however, to all the provisoes, clauses, covenants, and agreements contained in the original lease. All the estate and interest of W. T. became vested in R. F., who in 1891 purchased the reversion in fee of the Earl of R. R. F. died in 1896; and the trustees of his will sold his interest in the premises to A. (the plaintiff).

By a sub-lease dated the 9th Dec., 1896, portion of the premises comprised in the sub-lease of the 25th Dec., 1863, including Seville Lodge, passed into the occupation of B. and C. (the two other defendants). This sub-lease which was for a term of 750 years, excepted and reserved all such matters and things as were excepted and reserved in and by the lease of the 15th February, 1854, and was made subject to all the clauses, covenants, restrictions, reservations, and agreements therein contained so far as they affected the premises demised.

Since the date of the original lease the character of the surrounding neighbourhood had completely changed through the extension of the municipal boundaries of Belfast; and on portion of the premises, adjoining those in occupation of B. and C., the plaintiff herself had recently erected a number of small shops and dwelling-houses. The defendants B. and C. having commenced to excavate and remove the soil from the portion of the premises in their occupation, and to erect a large spirit grocery thereon:—

Held (by the Court of Appeal, affirming the decision of the Vice-Chancellor), that the interest under the lease of the 15th February, 1854, had not become merged in the reversion in fee, so as to destroy the plaintiff's rights under the sub-lease of 25th December, 1863; that the defendants had express notice of the restrictive covenants contained in the lease of the 15th February, 1854, when they respectively acquired their interests in the premises, and were in equity bound by them; that the right of a person to enforce a restrictive covenant by injunction, could not be defeated by mere change in the character of the neighbourhood, unless there was an equity against him arising from his acts or conduct in sanctioning or knowingly permitting such change as to render it unjust for him to seek relief by injunction; that there was not sufficient evidence of such conduct on the part of the plaintiff, and that she was accordingly entitled to an injunction restraining the erection of the spirit grocery aforesaid: but *held* (by the Court of Appeal, varying on these points the judgment of the Vice-Chancellor), that this injunction should not go against Arabella G.; and that the plaintiff was not entitled to relief on the ground that the conduct of the defendants in altering the character of the premises demised as a villa residence amounted to waste.

Duke of Bedford v. *The Trustees of the British Museum* (2 Myl. & K. 552), distinguished.

ACTION for damages for breach of covenant in a lease, by the assignee of the lessor against the assignee of the lessee, and for waste injurious to the plaintiff's reversion, and for an injunction to

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restrain the defendants from using any house on the demised premises as a public-house, &c., and from carting away the soil of the premises, and from erecting small houses or shops thereon, and from altering the character of the holding or otherwise committing waste on the premises.

The Earl of Ranfurly, who was owner in fee, by lease, dated April 1st, 1836, demised to Henry Waterson "a farm or parcel of land in the townland of Strandtown, containing 12A. 3R. 16P.," and by an agreement made in October, 1839, agreed to let to William T. Waterson "that farm or parcel of land next adjoining on the north side of the premises aforesaid, containing 6A. 0R. 24P." This lease and agreement were subsisting and were vested in William T. Waterson, when he surrendered them on taking out the lease next mentioned.

By lease dated February 15th, 1854, the Earl of Ranfurly demised to William T. Waterson the leasehold of 1836, called No. 1, and the tenement of 1839, called No. 2, making together an almost rectangular plot containing 19A.—No. 2 lying north, and No. 1 lying south. The demised premises were described in the lease as bounded on the north by "a lane or avenue dividing the premises from premises late in the possession of John Wallace," on the east by "Robert M'Cracken's farm," on the south by "the road from Belfast to Bangor," and on the west by "the road leading from Belfast to Holywood." The lease demised both No. 1 and No. 2 together for a term of 1000 years, reserving a bulk rent of £214 12*s.* 11*d.*, reducible to £114 (or £6 per acre) on observance of the lessee's covenants; mines and minerals, stone and gravel, timber and royalties, were reserved to the lessor.

The lease contained a covenant on the part of the lessee within three years from 1st November, 1853, to expend a sum of not less than £500 in "building a private dwelling-house, and the office houses thereof," "well and substantially finished" on No. 2, and also a covenant that he the said William Thomas Waterson, his executors, administrators and assigns, should not use or occupy any house, tenement or building, then built, or which should or might at any time thereafter be erected or built, on any part of the said demised premises, or let the same for the purpose of being used or occupied as a common public-house, or standing dram shop, mill,

or factory, or for any other purpose whatsoever, save and except and as for a private dwelling-house, or private dwelling-houses, or a tea and refreshment house, without the consent in writing of the said Earl of Ranfurly, first had and obtained. The lease contained a further covenant that the said William Thomas Waterson, his executors, administrators and assigns, should not nor would, without such consent of the said Earl of Ranfurly, his heirs, or assigns, as aforesaid, use or occupy or permit or suffer to be used or occupied any house, tenement, or building, then built or which should or might at any time or times thereafter be erected on that portion of the said thereby demised premises, and marked on the map No. 2, for any other purpose than as a private dwelling-house or private dwelling-houses only, each of which said private dwelling-houses, with the offices thereto, should have cost in the erection thereof a sum of at least £400 sterling. The lease contained a clause of forfeiture and re-entry on breach of any of the foregoing covenants. It was also provided that in case the lessee should at any time erect on any part of the premises described as No. 1, any building to be used as a house of public entertainment as hereinbefore specified, the part of the demised premises on which such house should be so erected, with the ground attached thereto, should be planted round so as effectually to shut out such part from the view of the adjoining premises, and that the villas intended to be erected on the part called No. 1, which should not require to be shut out from the view of the adjoining premises by planting, should be for private dwelling-houses only, and should be of the yearly value of £25 at least, exclusive of the value of the land belonging thereto.

The lease also contained the usual covenant to repair, special covenants to contribute to the repair of the northern boundary, and of an intended road or avenue leading to the sea, which lay further north, and also "to preserve and keep standing the trees and hedge, now on the demised premises next adjoining Sydenham-avenue, save only where it might be necessary to remove a part thereof to make an entrance or gateway from the demised premises" into that avenue. These latter covenants were not covered by the re-entry clause, but they were secured by the penal rent of £214 12*s.* 11*d.* The lessor covenanted to finish Sydenham-avenue,

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and to keep it open for the lessee in common with "the other tenants of the Ranfurly Estate."

By an indenture of sub-lease dated December 25th, 1863, reciting an agreement of October 17th, 1862, whereby "Seville Lodge," described as "being dilapidated," had been let to Arabella Greer on a promise of a long lease, in consideration of her making it habitable by "rebuilding it," William T. Waterson demised to the said Arabella Greer (one of the defendants), a portion of the premises demised by the original lease, and therein described as No. 1, in the sub-lease described as "that parcel of land with the dwelling-house, outhouses, and other buildings and erections thereon, commonly called Seville Lodge, as now in the occupation of Arabella Greer, and her under-tenants, containing 2R. and 23P." for a term of 800 years from the 1st November, 1863, in consideration of a yearly rent of £20, and an expenditure by her of £800 in repairing the house; "subject, however, to all the provisoes, clauses, covenants, and agreements mentioned and contained in the original lease, by which the said premises with others are held under the Earl of Ranfurly." This sub-lease also contained a covenant on the part of the lessee to keep the premises in good and sufficient repair and condition, and at the determination of the demise to so leave and yield up the same to the lessor.

The interest under the lease of the 15th February, 1854, of W. T. Waterson was sold in the Landed Estates Court to Robert Ferguson, and was conveyed to him by a deed dated the 3rd June, 1869. He subsequently purchased the reversion in fee of Lord Ranfurly, and obtained a conveyance of it on the 2nd December, 1891, subject to a fee-farm rent of £25 per annum, but indemnified by other premises against the same.

Robert Ferguson died on the 15th August, 1896, having previously made his will, dated the 20th February, 1895, of which he appointed Henry Cooke Craig and Alexander M'Dowell executors and trustees, with power to sell in their discretion all his lands, tenements, and hereditaments, or any part thereof. In pursuance of that power the executors, in consideration of the sum of £5728 6*s.* 8*d.*, executed a conveyance, dated the 2nd April, 1897, whereby they assigned the interest of Ferguson in the premises under the original lease of the 15th February, 1854, to a trustee

for the plaintiff, Mary Craig, and conveyed Ferguson's estate in fee in the same premises to the plaintiff, Mary Craig, herself.

At the commencement of the present action the premises comprised in the sub-lease of the 25th December, 1863, and known as Seville Lodge, were in the occupation of the defendants, William Thomas Braithwaite and Alexander M'Cann. The plaintiff averred that they were entitled to them under a lease made to them by the defendant, Arabella Greer. The defendants, Messrs. Braithwaite and M'Cann, however, alleged that the premises were demised to them by a lease dated the 9th December, 1896, from persons named Graham and Waldie of the first part, and Glenny and Dickie, who joined as mortgagees, of the second part. The title of these parties was derived under the marriage settlement of Sarah Taylor Greer, a niece of Arabella Greer, dated the 25th January, 1888, whereby Arabella Greer, reciting that she was possessed of four lots of ground at Strandtown, viz., Eden Vale, the two "Strandtown Lots," and Seville Lodge, as demised by the lease of the 25th December, 1863, by Waterson to Arabella Greer herself, assigned the same, subject to the rents, covenants and conditions contained in the indentures of lease under which they were held, to Graham and Waldie as trustees, upon trust for herself for life, and after her death upon the trusts of the settlement; and power was given to the trustees, with the consent in writing of Arabella Greer and Sarah Taylor Greer during their joint lives, to demise or grant these premises at the best rent that could be obtained without fine for any term consistent with the terms comprised in the recited leases.

By the lease of the 9th December, 1896, Graham and Waldie (Glenny and Dickie joining as mortgagees) demised Seville Lodge to the defendants, M'Cann and Braithwaite, by the description of "All that piece or parcel of building ground with the buildings at present thereon, being the premises comprised in an indenture of lease, of the 25th December, 1863, from William T. Waterson to Arabella Greer, portion of the lands of Strandtown, containing 2R. 23P., bounded on the north and east by premises of the representatives of Robert Ferguson, on the south by the Strandtown-road, and on the west by the Holywood-road, excepting and reserving all such matters and things as are excepted and reserved

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by a certain indenture of lease dated the 15th February, 1854, from the Earl of Ranfurly to W. T. Waterson, under which the premises, with others, were originally demised, to hold from the 1st November, 1896, for 750 years, subject to all tenancies, if any, at present subsisting, and also subject to all the clauses, covenants, restrictions, reservations, and agreements in the said indenture of lease of the 15th February, 1854, contained, so far as the same relate to or affect the premises hereby demised," at the yearly rent of £77 10*s*. M'Cann and Braithwaite covenanted within two years to expend £2000 at the least in erecting and completing, of sound material and in workmanlike manner, upon the premises, permanent buildings properly roofed with slates, and thenceforth to maintain the same, with a proviso for re-entry on non-payment of the rent, or if and whenever there should be a breach of covenant on the lessees' part therein contained, and the lessors covenanted for quiet enjoyment, the lessees paying the rent and observing the covenants by the lessees and conditions therein contained.

It was proved that express notice in writing of the restrictive covenants in the head lease was given to M'Cann and Braithwaite by the head landlords one month prior to the making of the lease under which they took the premises. The notice also warned them that any attempt to violate these covenants would be resisted.

Since the date of the lease of the 15th February, 1854, the character of the neighbourhood round the demised premises had greatly changed, owing to the growth of Belfast and the extension of the municipal boundary of that city.

The premises comprised in the sub-lease of the 25th December, 1863, were situated at an angle known as "Gelston's Corner," formed by the junction of two roads, called respectively Holywood-road and Strandtown-road, forming the western and southern boundaries of the tenement. The entrance to Seville Lodge was at the corner. In the lease of the 15th February, 1854, the southern boundary was described as the "Road from Belfast to Bangor." By the map on the lease it appeared that Seville Lodge and a row of four dwelling-houses called Ranfurly-place, were then in existence on the portion of the premises adjoining this road. The village of Strandtown was at the opposite side of the

same road, facing the demised premises, and it included the public-house which gave the name to Gelston's Corner.

At the date of the trial, a tramway had been constructed along this road, and except where Seville Lodge adjoined the road, there were buildings in continuous lines on either side consisting of small houses, a school-house, a post-office, and a large number of shops, including a public-house, and spirit groceries.

The schedule to the Landed Estates Court conveyance of June 3rd, 1869, showed that lot No. 2 was then held for long terms of 999 years, from 1853, under Waterson, and was occupied by villas, called Aspen Villa, Fern Villa, and Sydenham Villa, fronting Sydenham-avenue. All these villas were still existing at the date of the trial, and some additional villas had been erected on No. 2, but all were detached buildings surrounded by ornamental grounds presenting the usual appearance of suburban or rural private residences. The schedule also showed upon lot No. 1 the existence of eight sub-leases for various terms of places called Mary Villa, Laurel Lodge, Eden Vale, Sydenham House, and Seville Lodge, of two plots described as Strandtown, and of Ranfurly-place. At that time the land behind these houses went with them, but it was afterwards thrown into the grounds of Sydenham House, which was held under a lease, dated August 2nd, 1865, from Arabella Greer, as executrix of Waterson, to one C. B. Grimshaw, for fifteen years, from 1864.

Sydenham House became the residence of R. Ferguson, the plaintiff's father, and afterwards of herself. It had been much enlarged, and was a very fine villa residence, with a quantity of ornamental land surrounding it. Its northern boundary was an avenue which ran parallel to Sydenham-avenue; Strandtown-road, formed its southern boundary except where Seville Lodge, with its outbuildings, and the Ranfurly-place houses cut it off from that road. Recently the plaintiff, or her predecessors, had filled up the rest of the grounds of Sydenham House, where they abutted on the Strandtown-road, by erecting a smaller class of houses, including several shops. The plaintiff or her predecessors had also recently cut short the Sydenham House grounds at the eastern end, and had erected thereon a new street of small houses, about thirty in number. The rear of one side of this street bounded the Sydenham

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House grounds, and inside this boundary a further new street was shown upon plans approved by the Belfast Corporation, but it was alleged by the plaintiff that this was placed upon the plans only to induce the Corporation to sanction the erection of the existing street, and that it was not intended to encroach further upon the ground of Sydenham House. All these recent buildings lay behind and at a distance from Sydenham House.

The defendants, Braithwaite and M'Cann, having commenced to erect a large "family grocery" on the grounds attached to Seville Lodge, and to excavate and remove the soil for that purpose, the present action was instituted by Mary Craig against Arabella Greer and her sub-lessees Braithwaite and M'Cann.

Ronan, *Q.C.* (with him *Gordon*, *Q.C.*, and *Hume*), for the plaintiff:—

The defendants have no right to alter the entire character of the premises by the erection of a spirit grocery in violation of the restrictive covenants contained in the original lease, of which they had full notice.

Matheson, *Q.C.* (with him *Samuels*, *Q.C.*, and *Bates*), for the defendants:—

The sub-lease of 1863 contains no covenant on the part of Miss Greer to observe the covenants in the lease of 1854. She had notice of that deed, but once the reversion in fee became vested in Ferguson the lease of 1854 became merged in the fee, and consequently the obligations imposed on the sub-lessee under the deed of 1863 came to an end. Moreover, the plaintiff has, by her conduct, rendered the object of the lease unattainable, having altered the character of the premises by the erection of small shops and houses. She cannot now be listened to coming in to restrain the defendants from doing the same thing. The case in this respect depends on the doctrine of equitable estoppel: *Duke of Bedford* v. *The Trustees of the British Museum* (1); *Sayers* v. *Collyer* (2); *Roper* v. *Williams* (3); *Knight* v. *Simmonds* (4). The covenants here do not run with the land.

(1) 2 Myl. & K. 552.
(2) 28 Ch. D. 103.
(3) T. & R. 18.
(4) [1896] 2 Ch. 294.

In any event no liability can attach to Miss Greer, as she has not done anything to violate the covenants, or sanctioned or permitted the acts of the other defendants: *Hall* v. *Ewin* (1).

Hume, in reply:—

Our case rests on two propositions. First, on the original covenants contained in the original lease, carried on through all the leases, which in equity are binding on the lessee, and all persons claiming through him. Secondly, on the ordinary doctrine of waste.

The defendants had express notice of the covenants in the original lease, and if they contravene them an injunction lies to restrain them, whether the covenants run with the land or not: *Tulk* v. *Moxhay* (2).

To escape liability the defendants rely on the doctrine of merger and on the conduct of the lessor. As regards merger the covenants were originally inserted for the benefit of Lord Ranfurly, the owner in fee. The effect of merger would be to deprive the owner in fee of the benefit and right which the owner in fee originally possessed. There cannot be merger to that effect: 8 & 9 Vict. c. 106, s. 9. It is further provided by the Judicature Act, sect. 28, sub-s. 4, that there is no merger in law if not in equity. Merger in equity is based on intention; in the absence of it merger is not presumed unless for the benefit of the owner in fee. There may have been a merger of the term but not of the covenants: Lewin on Trusts, 9th Ed., 819; *David* v. *Sabin* (3). As regards the conduct of the lessor, no breach of covenant was committed by the plaintiff. Before the acquisition of the reversion in fee, it was quite open to the lessor to have erected shops or other buildings prohibited by the covenants in the lease, if he obtained the consent of the head landlord. Once the head landlord's interest was acquired by the lessor, his power to consent passed to the lessor also. Even assuming that the erection of small houses and shops on portion of the premises was a breach of covenant, it was coterminous with that of the defendants, and not one existing long before, and, moreover, the defendants were aware of it. The

(1) 37 Ch. D. 74. (2) 2 Phill. 774. (3) [1893] 1 Ch. 523.

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cases cited by the other side on this point have no application. In the case of *The Duke of Bedford* v. *The Trustees of the British Museum* (1) the object of the letting and the circumstances and dealing with the property were completely different, while in the other cases relied on the Court refused to interfere on the ground of *laches* or acquiescence on the part of the plaintiff, or where there was a general building scheme, and a duty was thereby cast upon the plaintiff of maintaining the character of the premises for the benefit of all.

The defendants have by their acts clearly committed waste. There was a distinct covenant in the sub-lease to keep the premises in repair, but they have entirely altered the character of the premises, which brings the case within the principles laid down in *Doherty* v. *Allman* (2).

Miss Greer, being a lessee, is as much liable as the other defendants: *Maunsell* v. *Hort* (3). In *Hall* v. *Ewin* (4) the action was against an assignee only, and he had parted with possession.

June 4.

THE VICE-CHANCELLOR:—

This action is brought for recovery of damages for breaches of covenant in a lease of the 25th December, 1863, from W. T. Waterson to the defendant Arabella Greer, and for waste injurious to the plaintiff's reversion in the demised premises, called Seville Lodge, and for an injunction to restrain the defendants from using any house on the demised premises as a public-house, spirit-grocery, dram shop, or shop for sale by retail, in breach of the covenants in the lease; and also from carting away the soil of the premises comprised in the lease, and from erecting small houses and shops on said land and premises, and from altering the character of the holding or otherwise committing waste on the premises.

The premises formed part of the estate in fee of the Earl of Ranfurly near Belfast. By lease, dated the 15th February, 1854, from Lord Ranfurly to Waterson, the Earl demised to Waterson two portions of said lands, called Strandtown, described on a map thereto annexed, one called No. 1, containing about 12A., and the other called No. 2, containing about 6A., for the term of 1000 years

(1) 2 Myl. & K. 552.
(2) 3 App. Cas. 709.
(3) 1 L. R. I. 88.
(4) 37 Ch. D. 74.

at a rent of £214, and the lease contained a covenant by the lessee to expend a sum of not less than £500 in building on No. 2, a private dwelling-house and offices, and also a covenant [His Lordship read the covenant as given, *ante*, p. 260], and a further covenant [His Lordship read the covenant as given, *ante*, p. 261], and also a clause of re-entry by Lord Ranfurly and his heirs and assigns, in case any house, tenement, or building then built or which should thereafter be built thereon, should at any time be used or occupied as or for a common public-house, or standing dram shop, mill or factory, or otherwise than as a private dwelling-house or private dwelling-houses, or a tea and refreshment house, and in case any house, tenement, or building then built, or which should thereafter be built on the part No. 2 should at any time thereafter be used or occupied for any other purpose than a private dwelling-house or dwelling-houses, each of which should not have cost in erection at least £400, that then, and in either of such cases, it should be lawful for Lord Ranfurly and his heirs and assigns to re-enter and hold discharged of the lease. It also contained a covenant that in case the lessee should at any time erect in any place on the part called No. 1, any building to be used as a house of public entertainment as thereinbefore specified, the part of the demised premises on which such house should be so erected, with the ground attached thereto, should be planted round, so as effectually to shut out such part from the view of the adjoining premises, and that the villas intended to be erected on the part called No. 1, which should not require to be shut out from the view of the adjoining premises by planting, should be for private dwelling-houses only, and should be of the yearly value of £25 at least.

There is a slight difference made in these covenants between the parts No. 1 and No. 2, as the restriction against using any house &c. on either No. 1 or No. 2 as a common public-house or dram shop, mill or factory, or for any other purpose whatsoever, save as for a private dwelling-house or private dwelling-houses or a tea and refreshment house, is followed by a separate covenant confined to No. 2, against using any house, &c., for any other purpose than a private dwelling-house or private dwelling-houses only, each of which private dwelling-houses shall have cost in erection at least £400, thus adding as to No. 2, the requirement

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that each house shall cost at least £400. This, however, does not seem to me to be material on the present question.

A sub-lease was made by Waterson to the defendant Arabella Greer of a portion of these premises called Seville Lodge, containing 2R. 23P., which is a portion of No. 1, dated the 25th December, 1863, by which Waterson demised to Arabella Greer the land, dwelling-house, out-houses and other buildings and erections thereon, commonly known by the name of Seville Lodge, and described on a map annexed thereto, for a term of 800 years, "subject, however, to all the provisoes, clauses, covenants, and agreements mentioned and contained in the original lease, by which said premises with others are held under the Earl of Ranfurly." There is not any express covenant by the lessee for performance of or obedience to the covenants in the original lease, but the lessee took the lease not only with express notice of, but also subject to, these provisoes, clauses, covenants, and agreements. It is also to be noted that it is plain from the language of this lease, and from the map annexed to it, that the premises were demised to Arabella Greer as a villa residence, and she obtained it in consideration of an expenditure by her of £800 in rebuilding the house and making extensive improvements on the premises. The lease contains the ordinary covenant that the lessee would, during the continuance of the demise, preserve, uphold, support, and keep the said demised premises and every part thereof, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition, and would at the determination of the demise so leave and yield up the same to the lessor.

The statement of claim avers that the defendants, Braithwaite and M'Cann, are in possession of the premises, known as Seville Lodge, and comprised in the said sub-lease of the 25th December, 1863, and are entitled to the same under a lease made by the defendant Arabella Greer to them. This averment is not expressly denied by her, but she alleges in her defence that by lease of the 9th December, 1896, made between persons named Graham and Waldie, and Glenny and Dickie, the lands comprised in the sub-lease of 25th December, 1863, were demised to Braithwaite and M'Cann, who hold the same under such lease and not otherwise.

The defendants Braithwaite and M'Cann, in their defence, allege that they hold the premises under the lease of the 9th December, 1896, and not under a lease from Arabella Greer. The sub-lease of the 9th December, 1896, was given in evidence, and purports to be made between Graham and Waldie of the first part, Glenny and Dickie, who join as mortgagees, of the second part, and M'Cann and Braithwaite of the third part, but it does not disclose the title of the parties of the first part, but merely calls them the lessors. The parcels mentioned are the "piece or parcel of *building ground* with the buildings at present thereon, being the premises comprised in an indenture of lease made the 25th December, 1863, between Waterson of the one part, and Arabella Greer of the other part, portion of the lands of Strandtown, containing 2R. 23P. statute measure, or thereabouts." The lease excepts and reserves all such matters and things as are excepted and reserved in and by the lease dated the 15th February, 1854, from Lord Ranfurly to Waterson. The grant, which was for 750 years, was made expressly subject to all the clauses, covenants, restrictions, reservations, and agreements in the indenture of lease of the 15th February, 1854, contained so far as they related to or affected the premises thereby demised. The lessees covenanted with the lessors to expend a sum of £2000 at the least in the erecting and finishing of good and substantially built permanent buildings. It is sufficiently clear that this sub-lease was made by the lessors as in some way entitled to all the estate and interest of Arabella Greer in the demised premises. Though Arabella Greer has severed in her defence from her co-defendants both defences were delivered by the same solicitor, and all were represented by the same counsel, and the case of all must be treated as a common one.

The sub-lease of the 9th December, 1896, it will be observed, not only contains proof of express notice of the original lease of 1854, but is, as in the former case, granted expressly subject to all the clauses, covenants, *restrictions*, reservations, and agreements contained in that lease.

The interest of Waterson under the lease of 1854 was sold in the Landed Estates Court to Robert Ferguson, and a conveyance thereof was executed to him in the year 1869.

Afterwards in the year 1891 he purchased the reversion in

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fee of Lord Ranfurly, and obtained a conveyance thereof to himself. Both these estates and interests were, after the death of Robert Ferguson, purchased by the plaintiff from the trustees of his will, who had a power of sale, and by conveyance of the 2nd April, 1897, the interest of Ferguson in the premises under the lease of 1854 was conveyed to a trustee for her, and his estate in fee in the same hereditaments was conveyed to her by those trustees.

It was contended for the defendants that by the union in Robert Ferguson of the interest of Waterson, under the lease of 1854, with the reversion in fee conveyed to him in 1891, the interest in the lease merged in the fee, and that it followed from this that all the covenants in the lease were put an end to. There is no force in this contention, for in the first place it is precluded by the express enactment in the 8 & 9 Vict. c. 106, sect. 9. But even independently of this statute, by the equitable doctrine as to merger, which is now by the Judicature Act the same both at law and in equity, merger was considered as a question of intention, in deciding which the Court looks to the benefit of the person in whom the two estates became vested. It could not be supposed in this case that Ferguson intended that the interest he possessed under the lease of 1854 should be merged in the reversion in fee, which would have destroyed his rights under the sub-lease of 1863.

But then it was said that these covenants do not run with the land, and that there was no privity of contract between the plaintiff and the defendants Braithwaite and M'Cann. Of course there is direct privity of contract between her and the defendant Greer. But assuming that the covenants and restrictions do not run with the land, there is the equitable rule, that where a person purchases an interest in land with notice of covenants restricting the use of the land in a particular way, the covenant will be enforced against him, whether the covenant runs with the land or not. In the case of *Tulk* v. *Moxhay* (1), Lord Cottenham, C., laid down, or rather affirmed the important principle, that the Court of Chancery has jurisdiction to enforce a contract between

(1) 2 Phill. 774.

the owner of land and his neighbours purchasing a part of it, that the latter should either use, not use, or abstain from using the land purchased in a particular way, and stated that he never knew it disputed. He held that the question was not whether the covenant ran with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. He observed that of course the price would be affected by the covenant, and that nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken. I may say that the present is an *a fortiori* case, for here the purchaser took expressly subject to the covenants and restrictions in the superior lease.

That case was considered by the Court of Appeal, in *Haywood* v. *Brunswick Building Society* (1), and was treated as the leading case on the subject, and as deciding that an assignee, taking land subject to restrictive covenants, is bound by such covenants if he has had notice of them. The case before the Court was distinguished from *Tulk* v. *Moxhay* (2), by the fact that the covenants there were not restrictive as in *Tulk* v. *Moxhay* (2), but affirmative covenants binding the purchaser to expend money, which would not be enforced on an assignee of the land, with whom there was no privity of contract. The defendants in that case were mortgagees. Lindley, L. J., says that it was not a case of landlord and tenant, which was a distinction never to be lost sight of.

In *Hall* v. *Ewin* (3) the case of *Tulk* v. *Moxhay* (2) was again under the consideration of the Court of Appeal. Cotton, L.J., says of that case:—"There is no doubt that under the principle in *Tulk* v. *Moxhay* (2), if a man had actually done anything in contravention of the covenants of which he had notice, the Court would grant an injunction. He adds that the principle there laid down was that if a man bought an underlease, although he was not bound at law by the *restrictive* covenants of the original lease, yet if he purchased with notice of these covenants, the Court of

(1) 8 Q. B. D. 403. (2) 2 Phill. 774. (3) 37 Ch. D. 74

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Chancery would not allow him to use the land in contravention of the covenants, and that that is a sound principle. The other Lords Justices agreed in this opinion. The case was decided on the authority of *Haywood* v. *The Brunswick Building Society* (1), and was said to be distinguished from *Tulk* v. *Moxhay* (2), on the ground that the injunction sought was in effect to compel the defendant to bring an action against his tenant to prevent him from doing the act complained of. In *Austerberry* v. *Corporation of Oldham* (3) the Court of Appeal again considered this subject, and expressed their approval of the principle laid down in *Tulk* v. *Moxhay* (2). The facts of that case, which was a proceeding to enforce a covenant to make and maintain a road, are so different from those here, that it is valuable only for the expression of the opinions of the Lords Justices as to the enforcing covenants not running with the land at law. The covenant was not restrictive, and Cotton, L. J., says, "Undoubtedly where there is a restrictive covenant, the burden and benefit of which do not run at law, Courts of Equity will restrain anyone who takes the property with notice of that covenant from using it in a way inconsistent with the covenant." In the judgments of Lindley and Fry, L. JJ., they, in considering the question of what covenants run with the land, carefully exclude cases of landlord and tenant from question.

The conclusion to be derived from these authorities is that the principle of *Tulk* v. *Moxhay* (2) is fully established, but that it is to be confined to restrictive covenants, and not applied to cases where the covenant is to do some act, such as repairing or improving the property, involving the expenditure of money. Therefore, even if the case of the plaintiff rested merely on the principle laid down in *Tulk* v. *Moxhay* (2), I should have no hesitation in holding that the defendants, who had express notice of these restrictive covenants, when they respectively acquired their interests in the premises, are in equity bound by them, and that they should be restrained by injunction from using the demised premises contrary to them. But the plaintiff's case does not rest there, for by the express terms of the leases of 1863 and 1896 the defendants took, subject to all the covenants, clauses, and restrictions contained in

(1) 8 Q. B. D. 403 (2) 2 Phill. 774. (3) 29 Ch. D. 750.

the lease of 1854. This, too, is a case as between landlord and tenant which, as observed in the cases to which I have referred, is not subject to the same considerations as those where that relation does not subsist between the parties.

The defence chiefly relied on was that from the change in the character of the neighbourhood, which has undoubtedly taken place, it would be inequitable in the proprietor of the ground to claim the assistance of the Court to restrain such building as that now in the course of erection by the tenants of Seville Lodge. Such relief has been refused in several cases. It is therefore necessary to consider these cases, and extract from them the general principles on which they proceeded.

Before referring to them I must see what the facts are in the present case which are material to this part of the case.

It appears upon the evidence that when the lease of 1863 was granted, the district in which these lands are situated was chiefly occupied with villa residences, of which Seville Lodge was one. But the city of Belfast was gradually spreading, and especially within the last few years, since a tramway service was established, and what were once country roads are being turned into streets of dwelling-houses, in many of which shops were set up. This, of course, greatly enhanced the value of all ground available for building, and offered strong temptation to the owners of it to turn it into streets instead of continuing it as sites for villas. At the other side of Belmont-avenue, opposite the premises demised by the lease of 1854, there is a nearly continuous row of small houses and shops, but the ground in question is still chiefly occupied with villas, there being no less than ten villa residences still occupied as such on the premises demised by the lease of 1854. The only street upon it now consists of houses very recently erected by the plaintiff, and that is at the part farthest from Seville Lodge. The plaintiff herself resides in what appears to be a handsome villa immediately adjoining Seville Lodge. Seville Lodge fell into bad repair, and was for some years occupied as a ladies' school, and since that was discontinued, it has been unoccupied. This change in the district was produced by causes altogether independent of any dealing with the premises by the plaintiff, for I cannot reasonably attribute it to the building of the houses at the

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far end of them by her, which was quite recent, and after the change in the character of the district had taken place. The place is only about half a mile from Belfast, and was until recently outside the municipal boundary, but that boundary was in the year 1894 extended to over a mile from the old limit. It was alleged that small houses have been lately built on a portion of the ground leased as Seville Lodge, but I think the evidence is that these were not new buildings but were the old offices and stables of Seville Lodge, formerly occupied by some of the servants, which are now, by whose act did not appear, occupied for other purposes. Until the commencement of the defendants' building complained of there do not appear to have been any other houses existing on the grounds of Seville Lodge. There was for a great many years a public-house at Gelston's corner not upon the plaintiff's lands, but at the opposite side of Belmont-avenue, and not in any way owned by the plaintiff.

The case of *The Duke of Bedford* v. *The Trustees of the British Museum* (1), is always referred to on this subject, where it was held that if the grantor's deed contained a covenant in effect restricting the grantee to a particular use of the subject of the grant, but those deriving under him had so altered the character of his lands adjoining the subject of the grant that the restrictions in the covenant ceased to be applicable to the new character of the land conveyed, according to the true intent and spirit of the contract, a Court of Equity would not interfere to enforce the covenant, but would leave the grantor to his remedy at law. Lord Eldon impliedly, and Sir T. Plumer expressly, based their judgment on the fact that the acts were those of the grantor, thus creating a personal equity against him, and those deriving from him.

This case was relied on by the defendants, and so was also the case of *Roper* v. *Williams* (2), also before Lord Eldon, where the owner of an estate suitable for building desired to sell it in suitable divisions, and had a general plan of it made, laying the ground out according to which purchasers were required to build, and they covenanted with the owner of the estate to build in conformity with the plan, and not otherwise. The owner, however, relaxed

(1) 2 Myl. & K. 552. (2) T. & R. 18.

this obligation in favour of certain purchasers, and it was held that as the plan was intended for the general benefit of all, the vendor could not obtain an injunction against other purchasers from infringing their covenants, as he had prevented the general plan from continuing. This was not a case of a change in the character of the neighbourhood, but was the direct act of the vendor alone.

In *German* v. *Chapman* (1), which also was a case of a general scheme laid out for the letting of an estate for building purposes, it was held that a covenant to be entered into by all the purchasers not to use their houses otherwise than as private residences, was not waived by the vendor giving permission to carry on a school in one of the houses on the estate. The case of *Roper* v. *Williams* (2), and also that of *Peek* v. *Mathews* (3) was there referred to and distinguished on the ground that the acts relied upon in those cases as amounting to a waiver were of such a nature as to render nugatory the general building schemes which were intended to be for the benefit of all the purchasers. The opening of a boarding school at a distant portion of the ground, and not interfering with the general design, was held not to amount to a waiver. There is no general building plan in the case before me, nor any covenants for the benefit of a class of purchasers, but a covenant entered into with the lessor alone for the benefit of herself, and the protection of her property.

I shall next refer to the case of *Sayers* v. *Collyer* (4) before the Court of Appeal which has an important bearing on the present. It was the case of a general building scheme laying out a building estate for sale in lots, and provided for covenants from each purchaser not to build a shop on his lot, or to use his house as a shop, or to carry on any trade therein. It was relied on that the covenant was waived by the fact that some of the houses so built had been used as shops; but it was held that the change in the character of the neighbourhood was not in itself a ground for refusing an injunction, because the change was not caused by the conduct of the plaintiff. Bowen, L.J., in his judgment says, that the case of *The Duke of Bedford* v. *The Trustees of the British*

(1) 7 Ch. D. 271.
(2) T. & R. 18.
(3) L. R. 3 Eq. 515.
(4) 28 Ch. D. 103.

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Museum (1) must not be misunderstood or misapplied; that it did not decide that contractual obligations disappeared as the circumstances changed; but that a person, who is entitled to the benefit of a restrictive covenant, may by his conduct or omissions put himself in such an altered relation to the person bound by it, as makes it manifestly unjust for him to ask the Court to insist on its enforcement by injunction. He adds that they did not decide that a mere alteration in the character of the neighbourhood would be sufficient, because there was no evidence that such alteration was caused by the plaintiff. Fry, L.J., says, that the rule in *The Duke of Bedford* v. *The Trustees of the British Museum* (1) was not applicable to that case; that it applies where an alteration takes place through the acts or permission of the plaintiff or those under whom he claims, so that his enforcing his covenant becomes unreasonable, but that he did not think that it applies to cases where the change which has taken place was beyond the control and independent of the action of the plaintiff. The case was decided on the ground of acquiescence by the plaintiff.

The last case which I shall refer to is *Knight* v. *Simmonds* (2), also in the Court of Appeal, which was one where there had been a sale of an estate in building lots with covenants not to allow any trade or business to be carried on upon the respective lots. It was held that the covenants did not run with the land, but the injunction was granted on the ground that the general scheme had not been materially departed from by the permission of the vendor. The facts of that case, however, were so different from the present that I do not think it has a material bearing on the question. No consideration arose there like that in *Sayers* v. *Collyer* (3) to which I have referred as to the change in the character of the neighbourhood.

The principle to be deduced from these authorities seems to me to be that in order to defeat the right of a person with whom a covenant has been entered into restricting the mode of user of lands sold or demised, it must be clearly established that there is a personal equity against him arising from his acts or conduct in sanctioning or knowingly permitting such a change in the character

(1) 2 Myl. & K. 552. (2) [1896] 2 Ch. 294. (3) 28 Ch. D. 103.

of the neighbourhood as to render it unjust in him to seek to enforce his covenant by injunction: a change resulting from causes independent of him will not have such an operation. As I have already stated, I am of opinion that the general change which has occurred in this neighbourhood arose from causes entirely independent of the plaintiff and those from whom she derives, and upon ground in which she has no estate or interest, and over which she had no control. The building by the plaintiff of the small houses at a remote part of her land cannot in my opinion be deemed such conduct on her part as to disentitle her to obtain an injunction against a breach of contract entered into with her by her tenant on the execution of the lease of 1863. I fail to see any injustice to the defendants in her suing to prevent a breach of covenant confined expressly to the holding called Seville Lodge, because on another portion of her property, at some distance from it, she has built houses which her tenant is precluded by her contract from building on the portion leased to her.

It was contended that the defendant Arabella Greer stands in a better position in this case than her co-defendants, as she is not proved to have authorized or sanctioned the breaches of her own covenant by the others. I do not think that her position is better than theirs. That she has been aware of their intention to erect the building objected to I can have no doubt. If she were now coming forward to disown their acts, she could more plausibly urge this contention, but so far from that being so, she has joined with them in resisting the plaintiff's claims. The defences are substantially the same, and delivered by the same solicitor, and she appeared at this trial by the same counsel. In the case of *Maunsell* v. *Hort* (1), which has much resemblance to this, the immediate lessee was made a defendant with the sub-tenants, who actually committed the acts complained of, and sought to escape liability to costs, because he did not actively resist the plaintiff's claim, but still the Master of the Rolls held him liable for costs jointly with his co-defendants. In the case of *Lord Pembroke* v. *Warren* (2) before me, Mr. Warren, the representative of the immediate lessee, was made a defendant with his sub-tenants, who alone were responsible for the acts complained of, and though he not only

(1) 1 L. R. I. 88. (2) [1896] 1 I. R. 76.

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did not resist the decree sought for, but as far as he could, co-operated with the plaintiff in obtaining it, no one thought of raising the question as to his being made a co-defendant; and though in consequence of his disowning the acts of his tenants, I did not hold him liable to pay the plaintiff's costs, I made him abide his own costs.

The case relied on to exempt Miss Greer from liability in the present suit is that of *Hall* v. *Ewin* (1), but there the sole defendant was a person who was not assignee of the lease containing the covenant, but only of an underlease, and therefore there was no privity of contract as here. He had taken no part in, nor authorized, nor sanctioned the acts of the under-tenant, and alleged that he had done all in his power, saving bringing an action, to prevent the under-tenant's acts. I am of opinion that this case does not support Miss Greer's contention, and I further incline to think that if she had not been joined as co-defendant, it might have been a good objection to the frame of the suit.

There is another head of relief relied on, namely, the restraining waste from being committed on the demised premises, by carting away the soil of the same, or by altering the character and description of the holding demised by the lease of 1863. It would be waste to raise and remove the soil for any purpose not required for the ordinary use and occupation of the premises as demised. It would also be waste to alter the nature of the holding from that of a villa residence to the site of a large shop.

The defendants admit the removal of the soil of the premises, but say it was for the purpose of erecting their buildings on the premises; but if they have no right to change the character of the holding by the erection of such buildings, they have no right to carry away the soil to make room for so doing. I am of opinion that the lease of 1863, on which alone this question arises, demised the premises as a villa residence, and that therefore it was waste to turn it into building ground.

I observe that in the lease from the assignees or trustees of Arabella Greer of 1896, the premises thereby demised are described as "*that piece or parcel of building ground* comprised in the lease of the 25th December, 1863." The lessors in that lease therefore

(1) 37 Ch. D. 74.

wrongfully dealt with the holding as building ground, and did not attempt thereby to restrict the use of it.

I am of opinion that the plaintiff is entitled to an injunction to restrain both the kinds of waste complained of.

It was contended by all the defendants, that the relief, if any, given in this case, should be by way of damages, and not by way of injunction, as it would be a hardship on the defendants to be restrained from continuing a building now nearly completed. But I cannot exercise the discretion clearly possessed by the Court, of giving relief either by injunction or award of damages in favour of the defendants, for this reason, that they had from the outset and before the commencement of any buildings, express and formal notice of the plaintiff's rights, and of her intention to insist on them.

I shall therefore decree as follows:—

Declare defendants are bound, in respect of the premises demised by Waterson to the defendant Arabella Greer, by the lease of the 25th December, 1863, by all the provisoes, clauses, covenants, and agreements contained in the lease of 15th February, 1854, which restrict the use or occupation of the premises thereby demised.

Injunction to restrain defendants from using or occupying any house, tenement, or building now built, or which shall at any time hereafter be erected or built on the premises demised by said lease of 25th December, 1863, or from setting or letting same for the purpose of, or otherwise permitting or suffering the same or any part thereof to be used or occupied, as or for a public-house or standing dram-shop, mill or factory, or for any other purpose whatsoever, save and except as and for a private dwelling-house, or private dwelling-houses, or for a tea and refreshment-room, without the consent in writing of the person or persons entitled to the reversion expectant on said lease of 15th February, 1854.

Injunction against waste, as in No. 4 of claim, omitting words "and from erecting small houses or shops on said land and premises."

Enquiry as to damages.

Payment of amount certified.

Defendants to pay plaintiff's costs.

J. MAC M.

Appeal. 1898. Nov. 24, 25.

The defendants appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ.).

Matheson, Q.C., and *Samuels, Q.C.* (with them *Bates*), for the appellants.

Ronan, Q.C., and *Hume* (with them *Gordon, Q.C.*), for the respondent.

The arguments were the same as those in the Court below.

Dec. 16.

Lord Ashbourne, C.:—

This is an appeal from an order of the Vice-Chancellor, who decided in favour of the plaintiff on all points.

The action was brought to recover damages in respect of breaches of covenant in the lease of 1863, and for waste injurious to the plaintiff's reversion in the premises (called for convenience "Seville Lodge"), and for an injunction to restrain the defendants from using any house on the demised premises as a public-house, spiritgrocer's dram-shop, or retail shop, in breach of the covenant, and from altering the character of the holding, or otherwise committing waste on the premises.

The judgment of the Vice-Chancellor sets out with great clearness the various leases relating to or affecting the lands in question, and as I am aware that FitzGibbon, L.J., discusses them and the title to the premises with all requisite detail, I only deem it necessary to make such references to them as may make my meaning clear.

Lord Ranfurly was the owner in fee, and by lease of 1854 he demised 19 acres to Waterson, who thereby covenanted (*inter alia*) that he, his executors, administrators and assigns, should not use or occupy any house, tenement, or building then built, or which should be thereafter built, on any part of the demised premises, or let the same for the purpose of being used, or permit or suffer the same or any part thereof to be used or occupied as a common public-house, or standing dram-shop, mill, or factory, or for any other purpose whatsoever, save as a private dwelling-house, or a tea and refreshment house, without the consent in writing of Lord Ranfurly.

A sub-lease was made by Waterson in 1863 of a portion of the premises called "Seville Lodge," and comprising 2 roods 23 perches, to the defendant Arabella Greer, for 800 years, subject, however, to all the provisoes, clauses, covenants, and agreements mentioned and contained in the original lease of 1854.

The defendants Braithwaite and M'Cann are in possession of the Seville Lodge premises comprised in the lease of 1863, under a lease dated 9th December, 1896, with the exceptions in the lease of 1854. The lessees covenanted to expend £2000 in buildings, and the lease is made expressly subject to all the clauses, covenants, restrictions, reservations and agreements contained in the lease of 1854.

The interest of Waterson under the lease of 1854 was sold in the Landed Estates Court to Robert Ferguson in the year 1869, and afterwards in 1891 he purchased the reversion in fee of Lord Ranfurly. In the year 1897 the interest of Ferguson in the premises under the lease of 1854 was conveyed to a trustee for the plaintiff, and his estate in fee in the same premises was conveyed to her by his trustees. The argument that the interest in the lease merged in the fee, and that the covenants in the lease were put an end to, has been sufficiently disposed of in the judgment of the Vice-Chancellor.

What is complained of in this action by the plaintiff is that a large house has been built quite close to Seville Lodge, intended for a grocery shop, and that that is a violation of the covenants in the lease of 1854, and that it alters and destroys the entire character of Seville Lodge as a villa holding.

In my opinion the Vice-Chancellor was entirely right in holding that the erection of this building as a grocery shop was a clear violation of the covenants in the lease of 1854, and that these covenants were expressly brought to the knowledge of, and bound the defendants. M'Cann and Braithwaite were actually served with the clearest warning notices not to proceed with the building of this shop, but they insisted that they were within their rights, and must accept the risk and responsibility of their action.

In addition, however, to the breach of covenant the Vice-Chancellor held that the defendants were also liable for altering the character of the holding as a villa residence, and were thus guilty

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of waste. I must say I was a good deal impressed by this view, because unquestionably the character of the holding is changed, and the erection of this new building—no matter what it may become—so near Seville Lodge seriously interferes with its amenity, and the entrance has ceased to be very attractive. But, after all, the question is—What are the rights of the defendants and the restrictions by which they are bound? Under the lease of 1854 there was nothing to prevent the erection of such a building, if not a shop, and I cannot find in the lease of 1863 any dedication of the lands thereby demised to the sole purpose of a villa residence. I am also impressed by the fact that the lease of these lands was for 800 years, and that it could not be said that any injury was done to the reversion by the erection of this building, which must largely add to the security for the rent. This topic was given great prominence by Sir G. Jessel, M.R., in the case of *Jones* v. *Chappel* (1) and was also relied on in the case of *Meux* v. *Cobley* (2). I am therefore obliged, with every respect, to differ from the Vice-Chancellor on this second ground of waste by changing the character of the holding, and not leaving it in the same condition as a villa on ornamental grounds, which existed in 1863.

A topic forcibly pressed by defendants was that since the date of the covenant the whole district has changed, the shops and streets have come into existence, that a tramway has appeared; but this would not at all impair the right of a landlord to rely on covenants in a lease. Then it was partly suggested that the case should be regarded from the point of view of cases where there was, if not a general plan, at all events a kind of building scheme. I can see no real ground for that except the lease of 1863 itself, and possibly the advertisements of 1896. Stronger reliance was placed on the acts of plaintiff herself, which it was alleged should be regarded in equity as estopping her from charging the defendants with the breach of the covenants relied on in this action. I can see nothing sufficient to deprive her of the right to rely upon these covenants if so minded. Her own building of certain small houses on quite another part of the holding could not on any principle of equity be regarded

(1) L. R. 20 Eq. 539. (2) [1892] 2 Ch. 253.

as sufficient to deprive her of her rights to insist on the performance of covenants in reference to the holding in general. We were asked to assume that the plaintiff had some indirect motive in seeking to assert the covenants against the defendants; but rights, not motives, must govern the decision of Courts in such matters. This is a point put clearly in the case of the *Mayor of Bradford* v. *Pickles* (1).

The case of *The Duke of Bedford* v. *The Trustees of the British Museum* (2) has been much relied on; but its facts and circumstances are quite distinguishable. Sir T. Plumer, M. R., at p. 574, says:—"The case made by the bill, therefore, is not that which was contemplated by the deed. The case made by the bill is that this erection will obstruct the view of the lessees of the new houses which have been built on the adjoining land. Was that the design of the obligation? The very circumstance of the Bedford family having surrounded Montague House with streets and buildings, after having become parties to this contract (the intention being that the contiguous mansions should be inhabited by noble families) is made the ground on which the equitable relief is sought, because otherwise, it is said, these lessees will be prevented from enjoying the view into the gardens and grounds of the museum. Would not that be to apply all the covenants of the deed to a different state of things from that which was the object and design of both parties? The question, then, is whether a Court of Equity is bound to assist a party to do that which neither party contemplated, and whether it would not be inequitable, unreasonable, and unjust to enforce the covenants specifically in the existing state of the property; and considering it in that view, I entertain a strong opinion that this is not a case in which the Court ought to interfere."

The case of *Sayers* v. *Collyer* (3), decided by Mr. Justice Pearson, has also been relied on, but the ground of the decision was that the plaintiff's acts had disentitled plaintiff to the relief sought. When the case came before the Court of Appeal (4) the decision of Mr. Justice Pearson was affirmed, and expressly on the ground

(1) [1895] A. C. 587.
(2) Myl. & K. 552.
(3) 24 Ch. D. 180.
(4) 28 Ch. D. 103.

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of the plaintiff's acquiescence, and Bowen, L. J., puts it in the clearest way. He says, at p. 108:—"I agree that the true ground for deciding this case is not the mere fact of the alteration of the proprietary character of the neighbourhood. The case of the *Duke of Bedford* v. *The Trustees of the British Museum* (1) must not be misunderstood or misapplied. It did not decide that contractual obligations disappeared as circumstances changed; but that a person who is entitled to the benefit of a restrictive covenant may, by his conduct or omissions, put himself in such an altered relation to the person bound by it as makes it manifestly unjust for him to ask a Court to insist on its enforcement by injunction. It was decided on equitable grounds that in such a case there would be an equity against the plaintiff which would bar that particular relief. In the present case we do not decide that a mere alteration in the character of the neighbourhood would be sufficient, because there is no evidence that such alteration was caused by the plaintiff. But the true ground of our decision is that the plaintiff's conduct amounts to acquiescence. He has no right to come here for an injunction after the way in which he has behaved towards the defendant."

Then the case of *Doherty* v. *Allman* (2) has naturally been much discussed, having regard to its high authority and the aptness of many of the observations of Lord Cairns and Lord Blackburn to some of the circumstances of the present case. As I think, they entirely support the views which I have expressed both in reference to the covenants and the alleged waste.

As to the objection taken that Miss Greer was improperly made a defendant, I do not deem it necessary to add anything to what the Vice-Chancellor has said on the subject.

As a result, in my opinion the order of the Vice-Chancellor as to the breach of covenants was quite right, but the injunction cannot include Miss Greer; I think, moreover, his order must be varied so far as he seeks to give any relief in reference to the waste alleged.

As to costs, Miss Greer will bear her own costs, but the other defendants must pay the costs of the appeal.

(1) 2. M. & K. 552. (2) 3 App. Cas. 709.

FITZ GIBBON, L.J. :—

The injunction granted by the Vice-Chancellor with costs and damages is based, first, on breach of covenant; and, secondly, on "waste" in removing the soil and in altering the character of Seville Lodge as a villa residence. Besides a denial of the alleged cause of action, the appellants rely on an equitable estoppel, *in personam*, against the plaintiff; and there is a further question whether the defendant, Arabella Greer, has been rightly sued, or rightly included in the injunction.

I propose to consider, first, the obligations, by way of contract, which affect the use of the premises in question; secondly, whether the acts complained of can be restrained upon the ground of "waste"; thirdly, whether the plaintiff can be estopped from restraining those acts; and, lastly, whether Arabella Greer is liable to be sued for them.

The obligations affecting the use of the premises must rest on the title, and to explain the grounds of our decision, I think it well to state the documents of title in order of date, though the Vice-Chancellor has done so in his judgment.

[His Lordship then stated the title, and in doing so observed that the lease of 1854 showed that, at that time, new roads and avenues were being laid out, and that the property was being opened up as a suburb of Belfast, though as yet neither included within the municipal boundary, nor possessing from continuous rows of houses or otherwise, anything like an urban character; that the covenants indicated the character of the neighbourhood, and the intentions of the parties showed that, even in 1854, there was some degree of difference between the northern and southern divisions of the holding, and between the frontage to Sydenham-avenue and that to the Strandtown-road.]

The effect of these covenants seems clear, provided they remain capable of enforcement. As to No. 2, the rural character of the northern boundary, Sydenham-avenue, was to be maintained, so far as keeping up the trees and hedge could do so. One house costing at least £500 was to be erected within three years, and nothing but private dwelling-houses, each costing £400 at least, was to be at any time erected or allowed. As to No. 1, there was an exception, under special restrictions, in favour of "a

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tea and refreshment house," otherwise called "a house of public entertainment," but such a house, if erected, was to be effectually shut out by planting from the view of the adjoining premises." "Villas" intended to be erected on No. 1 need not be shut out from view by planting, but they must be private dwelling-houses only, and each of them must be of the yearly value of £25 at least, exclusive of the land attached.

It seems impossible to doubt that the provision as to screening the refreshment house was one for the benefit of the adjoining portions of the demised premises; and, if necessary, I should hold that this provision, especially when taken in connection with the declared intention to erect "villas," was one upon which tenants of other portions of these premises could insist, as forming part of what has been called, in the cases, a "general scheme." Any "common public-house, standing dram-shop, mill, or factory," was specifically prohibited, and the same prohibition was, by general words, extended to everything except private dwelling-houses, with the one and only exception of the "tea and refreshment house," which, if built, was to be hidden by planting.

Stringent as these covenants are, I cannot possibly extend them, or anything in the lease of 1854, as the Vice-Chancellor seems to have done, to a dedication of the demised premises in whole or in part, perpetually or at all, to sites for "villas," in the sense of detached houses standing each in grounds of its own. So long as the northern fence was respected, even No. 2 might be wholly covered by "private dwelling-houses," detached or semi-detached, in rows or in streets, provided only that each of them cost at least £400. No. 1 might be similarly covered with private dwelling-houses, provided that each of them was of the yearly value of £25, exclusive of the site, and No. 1 might, in addition, be made the site of any "building to be used or occupied as a tea and refreshment house," if "all planted around" so as to be effectually shut out from the view of the adjoining premises. For the erection of houses which complied with these conditions, the demised nineteen acres, and each and every part thereof, was, by the terms of the lease of 1854, lawful "building ground." But any building contravening these covenants involved risk of forfeiture of the entire nineteen acres, and a penal rent of £214 12*s.* 11*d.*

Such was, and if the covenants are still enforceable, such is, the effect of taking or holding any part of the demised premises, "subject to the covenants and conditions contained in the original lease of February 15, 1854."

Arabella Greer spent £800 on "Seville Lodge," and made it a good villa residence, standing on less than half an acre of its own ground, with an avenue at the apex of the corner called a "carriage entrance," with a footpath entrance, up steps, from the Holywood-road, and with out-buildings and a back entrance from the Strandtown-road. The map on the under-lease of 1863 looked "ornamental," but the description in the lease showed that the place owed its then condition to Arabella Greer's expenditure, and the evidence as to the use of the out-buildings, and as to the gradient of the so-called carriage drive, and the size of the "sweep" at the hall door, lead to the inference that, though a villa residence, it was a modest one at best, and it owed its value and character mainly to the lessee's expenditure. The "*fons et origo malorum*" might, perhaps, be found in the fact that the angle which it occupies cuts into the more ambitious residence of the plaintiff, Sydenham House, and runs up to the more pretentious entrance to Sydenham House from the Holywood-road.

The under-lease of 1863 demised "Seville Lodge" to Arabella Greer for 800 years at a rent of £20, by the description of "that parcel of land with the dwelling-house, out-houses, and other buildings and erections thereon called Seville Lodge, as now in the occupation of Arabella Greer and her under-tenants, containing 2R. 23P." bounded as described in the map—"subject, however, to all the provisions, clauses, covenants, and agreements contained in the original lease by which said premises with others are held under the Earl of Ranfurly."

It does not seem to me to make any practical difference whether these words amount to a new covenant as between middleman and under-lessee not to build shops, &c., or to a like new covenant to observe the restrictions imposed by the head lease, or merely to an obligation to protect the middleman from liability to the head landlord. In any view they *prima facie* restrict the use of the premises in the manner prescribed by the head lease.

The under-lease contains no other clause or covenant whatever

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indicating any restriction upon the use of the premises, or their having any special character, except the common tenant's covenant to keep the demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition.

Granting that this under-lease, by express notice and reference, subjects the under-tenant to all the restrictions of the head lease, it contains nothing that can extend them. I cannot see for example how any obligation was imposed upon the under-tenant, or upon the underlet premises, which could prevent Seville Lodge from being changed from a detached villa into a semi-detached one, or to one of a terrace, or the whole 2R. 23P. from being built upon, provided that each added building was of the prescribed value, and was occupied as a private dwelling-house only. Nor can I even see anything to prevent the under-tenant from erecting upon a suitable part of the 2R. 23P., if such could be found, the permitted "tea and refreshment house," if space would permit its being "all planted around" as prescribed by the original lease.

Upon the argument that "a villa it was, and a villa it must remain in *sæcula sæculorum*," it is material to observe that the evidence, and the under-lease itself, indicate that in 1863, at the date of the under lease, some at least of the out-buildings which fronted the Strandtown-road, and which were (Q. 55) originally the office houses of Seville Lodge, were occupied by under-tenants of Arabella Greer, and that (Q. 57) one of them at least was then used as a separate dwelling. The plaintiff (Q. 58) "makes no complaint about them." Seville Lodge fronts to the Holywood-road for about 120 feet, and the subdemised ground extends along the Strandtown-road for more than 300 feet, of which about 100 feet frontage is occupied by these "outbuildings."

But while I fail to see how Seville Lodge or its grounds can have become subject to any additional restrictions through the operation of the under-lease, they must, as it seems to me, remain subject to all those which were imposed by the head lease, so long as these can be insisted upon by any competent plaintiff.

I can find nothing in the evidence to indicate any release from these restrictions, or any equitable estoppel against insisting upon them, which could now prevent the owners in fee, or indeed even the under-tenants of other portions of the 19 acres, other than the

plaintiff, if injuriously affected by breaches of the original covenants, from enforcing those covenants.

From this point of view, a defeat of the present suit through a personal estoppel of the present plaintiff, might be only a Pyrrhic victory for the defendants, while their defeat may perhaps have the consolation that the plaintiff herself, if she has broken those covenants upon her own portion of the demised lands, may perhaps in turn be made answerable by other parties not now before the Court. In her present success it may be well for her to take an extra-judicial hint to look out for the consequences.

The Landed Estates Court conveyance of the 3rd June, 1869, showed that No. 2 was then, as it is still, held for long terms of 999 years from 1853 under Waterson, and was occupied, as it is still, by detached buildings, surrounded by ornamental grounds, apparently valuable, and preserving their character of rural, or at least suburban, private residences. The same conveyance showed upon Lot No. 1 the existence of eight sub-leases. The plaintiff and her predecessors had since cut short the Sydenham House grounds, and had erected a number of small houses, but all these recent buildings lie behind or beside Sydenham House itself, and at such a distance as not substantially to encroach upon the grounds close to the house, nor to very materially affect its "amenities" as a detached residence.

Apparently in consequence of some incident to the fee-simple title, which is not fully disclosed in the evidence, the conveyance of 1891 was made subject to, but indemnified by other premises against, a fee-farm rent of £25 per annum. This circumstance may be material upon the question of merger.

By the combined operation of the assignment of 1869, and of the conveyance of 1891, Robert Ferguson acquired both the superior interests in reversion upon the lease of Seville Lodge of 1863—viz. the lease of 1854—and the reversion in fee. Although the rent reserved by the lease of 1854, either was merged or became payable by Robert Ferguson to himself, I cannot think that his acquisition of the two interests could in any way lessen or affect, at least in equity, the obligations of the under-tenant under the lease of 1863 to the owners of the reversion upon that lease. That under-lease was expressed to be subject to the restrictions upon

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building which were contained in the middle lease of 1854. Those restrictions protected the "amenity" of the demised 19 acres as a whole, and if the owner in fee could have enforced those restrictions against either the middleman or the under-tenant for the benefit of his own property, I cannot see that the middleman deprived himself of protection, as against the under-tenant, merely by buying the head landlord's estate.

Apart from the question of equitable estoppel against the present plaintiff, I can find nothing to prevent the owners of the reversion in the sub-lease, or the owners of the Ranfurly estate in the rest of the premises, from enforcing the restrictions of 1854 against the occupiers of Seville Lodge, or, for that matter, against the portion of the demised premises, containing five acres, which the plaintiff acquired under the deed of 1897.

Having regard to its date, to its recitals, and to the fact that it comprises only five acres of the nineteen acres in the lease of 1854, the conveyance of April 2nd, 1897, is suspicious, so far as it treats the lease of 1854 as still subsisting. It looks like an attempt to revive that lease, or at all events to vest in the plaintiff a right of action upon the covenants contained in it. It would be more natural that whatever rights exist against the occupiers of Seville Lodge, should be asserted by Robert Ferguson's trustees as the owners in fee of the nineteen acres. It is a further suspicious circumstance that the 5A. 0R. 7P. are not identified, so as to show how many of the new houses behind and alongside Sydenham House are included. It seems likely that some of them are outside the plaintiff's purchase. But this conveyance unquestionably vests the fee-simple in Sydenham House, Ranfurly-place, and Seville Lodge, and the reversion upon the lease of 1863, in the present plaintiff; and therefore, unless some personal estoppel exists against her, she is proved to possess a title, both as owner in fee of adjoining premises, and also as the immediate reversioner upon the lease of 1863, to assert whatever rights exist under that instrument against the occupiers of Seville Lodge.

Arabella Greer is the actual lessee in the lease of 1863, and therefore any subsisting liabilities *ex contractu* under that instrument bind her. The title of the other defendants is derived from her,

through the deed of January 25th, 1888, which recites that she was possessed of the premises, subject to the rents, covenants, and conditions contained in the indentures of lease under which they were held, and the lease of December 9th, 1896, which described Seville Lodge as "being the premises comprised in an indenture of lease of December 25th, 1863, from W. T. Waterson to Arabella Greer," and which excepted everything "excepted and reserved by the lease of February 15th, 1854, from the Earl of Ranfurly to W. T. Waterson, under which the premises with others, were originally demised," and the defendants M'Cann and Braithwaite took expressly "subject to all the clauses, covenants, restrictions, reservations and agreements in the said indenture of lease of February 15th, 1854, contained, so far as the same relate to or affect the premises hereby demised." There is no limitation to such of the covenants as might be subsisting, and no suggestion that they are not in full force, and the lease is fully described by date and parties.

On November 13th, 1896, nearly a month before the conveyance to them, and five months before the conveyance to the plaintiff, written notice was served on M'Cann and Braithwaite by the solicitors for the representatives of Ferguson, as the head landlords, that they had been informed that Miss Greer had made a letting to them for the purpose of a shop or spirit grocery; that the head lease contained covenants prohibiting any building on the premises from being used for any other purpose than a private dwelling-house, or a tea and refreshment-house, and that any tea and refreshment-house was to be planted off, and that a public-house or dram-shop was expressly prohibited, that the head lease was vested in the representatives of Ferguson, and that they would insist on the provisions of this head lease being absolutely adhered to. A copy of the restrictive covenants was sent on January 12th, 1897, and on April 6th, 1897, four days after its execution, a further notice was given of the conveyance to the plaintiff. Excavations, when commenced along the front road, were objected to, and the further objection was then, for the first time made, that from the lease of 1863, it was clear that the property was let as a villa and grounds, and any attempt to destroy the original character of the holding by building a frontage would injure the

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adjoining property belonging to the plaintiff, which was also held under one head lease, and that an injunction would be applied for, if Braithwaite and M'Cann did not state what their intentions really were, and show them to have been misinterpreted.

After the first warning, Braithwaite and M'Cann took their lease, and in spite of the subsequent warnings, they have proceeded with the building now complained of.

This building is at the corner of the Strandtown and Holywood-roads. It is a large structure, or range of structures, suitable for shops on the ground floor, and wholly or partly designed and intended for a spirit grocery. At Q. 330 the defendants' witness states, "It is intended to conduct a family grocery which includes a spirit licence; it must have that." It is therefore in flat contravention of the express terms of the lease of 1854, and its erection must be restrained, if the lease of Seville Lodge on which it stands, is still, in the words of the lease of 1863, of the assignment of 1888, and of the lease of 1896, "subject to the covenants contained in the lease of 1854."

Regarded as a building, apart from its use as a shop, it is undoubtedly worth more than £25 per annum, and I think we should assume that, by alterations, it might be made fit for use as a private dwelling-house, although it was not designed for that purpose. It is sworn that it can be used as a "tea and refreshment house," but it seems very doubtful that it can be "planted around," so as to comply with the covenant in that behalf in the lease of 1854. Its longest frontage is to the Strandtown-road, but it occupies the corner, and it faces for some thirty or forty feet towards the Holywood-road also. I attach no importance to any effect which it may have merely as an "eyesore" from Sydenham House itself, because Seville Lodge stands between the two, but it does away with the former entrance to Seville Lodge; the northern side of it is a blank wall running from close to the front corner of Seville Lodge to the road, necessitating the making of a new entrance, and completely altering the character of Seville Lodge as a villa surrounded by private grounds. For habitation as a private dwelling-house, Seville Lodge, however, is still available, though it certainly cannot be fairly regarded as remaining as "eligible" as it was before.

Apart from estoppel, I can see no answer to the action, so far as the construction or intended use of this new building for a grocery, or for any other sort of shop, is concerned. I also agree with the Vice-Chancellor that its erection does "alter the character" of Seville Lodge; but having already expressed my opinion that the original lease of 1854 did not prevent the lessees from erecting other private dwelling-houses upon the lands of Seville Lodge, and that the sub-lease of 1863 did not increase the restrictions imposed by the original lease, and being satisfied upon the evidence that the erection of this new building, provided and so long as it is used in a manner that is permitted, will increase the security for the rent reserved by the sub-lease, and will not depreciate the reversion upon that lease, I cannot see my way to founding any relief either upon the ground of waste, or upon the ground of an implied covenant or obligation to retain Seville Lodge and the grounds about it in the same condition, as a villa with ornamental grounds, which existed in 1863. Such an implied covenant would, in my opinion, be inconsistent with the express provisions of the lease of 1854, and all the circumstances of the locality in 1854, in 1863, and much more now, seem to me to make it unreasonable to suppose that it was ever intended that the grounds of Seville Lodge should never be utilized for additional buildings, even assuming that Seville Lodge itself was to be maintained as a private dwelling-house.

I think, therefore, that the ground of the injunction granted by the Vice-Chancellor is too wide, and that it must be narrowed to the ground of breach of an obligation founded on contract. It is the clear doctrine of equity, in general, that there is no difference as regards the liability to an injunction, between the original parties to a contract such as we have here, and those who take property with express notice of such a contract, when sued by persons, whether parties or privies, who suffer from breach of the terms of the contract, and who are within its protection as owners of property protected by the original contract.

In such a case, as put by Kay, L. J., in *Knight* v. *Simmonds* (1), "in equity it is just the same as if the defendant, or the defendant's

(1) [1896] 2 Ch. 301.

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predecessors, had entered into that covenant with the predecessor in title of the plaintiff directly."

The next question is whether Mary Craig, the plaintiff, is estopped from insisting upon the observance of the restrictive covenants in the lease of 1854, upon the equitable principle on which *The Duke of Bedford* v. *The British Museum* (1) is the leading case. The widest foundation of that principle is the old maxim that he who seeks equity must come into Court with clean hands. Its "true ground" is stated more definitely by Bowen, L.J., in *Sayers* v. *Collyer* (2)—"a person who is entitled to the benefit of a restrictive covenant may, by his conduct or omission, put himself in such an altered relation to the person bound by it as makes it manifestly unjust for him to ask a Court to insist on its enforcement by injunction." We shall presently see how cautiously and narrowly this refusal of assistance has been sanctioned by authority. But first we should see what the plaintiff here has done.

The conduct relied upon against the plaintiff was not altogether her own; it includes, and she must answer for, that of her predecessors in title, her father's trustees. They advertised parts, if not the whole, of the land which she bought, as suitable for building. They began, and she has continued, the erection upon other parts of the leasehold of 1854, including part of the land hitherto held and occupied with Sydenham House, buildings which violate the conditions in that lease. It is proved that they or she have erected a large number of small houses which, as a juror, I find not to be worth £25 per annum each besides the value of the site, and seven at least of these are used as shops.

But how far do these breaches of the covenants establish the unreasonableness of allowing the plaintiff now to object to the opening of this spirit grocery, which turns the corner of Holywood-road, and runs up to within about 60 feet of the gate lodge and entrance of Sydenham House, where the plaintiff lives? The Holywood-road has until now retained, unaltered, the suburban character which it had in 1854. All the rest of the nineteen acres lying in that direction is still, as it was in 1863, and in 1869, occupied by detached villas, and by private dwellings. The evidence

(1) 2 M. & K. 552. (2) 28 Ch. Div. 198.

on both sides contains "expert" and other exaggerations, in opposite directions, but it does seem to me that the opening of a shop of any kind, and *a fortiori* of a spirit grocery, in this big building, on this site, will have an injurious effect upon Sydenham House as a private residence, much greater in degree, and differing even in kind, from the effect of the erection of houses, and the opening of shops, at the eastern end, or on the Strandtown frontage, of the plaintiff's premises. On that ground alone—namely, on the ground of the *reasonableness in fact* of the plaintiff's objection to the defendant's structure, as something far more injurious than anything that has been done by herself or by anyone else—I could not extend the equitable estoppel by conduct to prevent the plaintiff from insisting upon her contractual rights.

But furthermore, upon the law, I find great difficulty in extending the principle of the *British Museum Case* (1) at all to the present. I doubt that the principle can be applied between landlord and tenant, where, as here, the defendants hold under a series of instruments, which, from first to last, have repeatedly and expressly mentioned the restrictions and covenants of 1854 as still subsisting, and as affecting the tenement in question. In every deed from 1854 to 1897, for plaintiff as well as for defendant, the property has been declared to be subject to these restrictions, in terms which it is hard to treat as falling short of a continuous series of estoppels by deed against contending that the covenants are incapable of enforcement.

The judgment of Lord Cairns in *Doherty* v. *Allman* (2), indicates in the mind of that high authority, an essential distinction between the obligation of express contract, or of tenure subject to express conditions, on the one hand, and implied obligations upon the other. But even if it may be possible, under certain circumstances, to estop a plaintiff landlord from insisting, against a defendant tenant, upon compliance with an express contract, it must rest upon the defendants to establish the equity, and they seem to me to have failed to do so here. Bowen, L. J. says—"The case of *The Duke of Bedford* v. *British Museum* (1) must not be misunderstood or misapplied." But has any case approached

(1) 2 M. & K. 552. (2) 3 App. Cas. at p. 730.

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the present in the direction of holding conduct to make it "manifestly unjust" to insist on a contractual obligation? *Sayers* v. *Collyer* (1) was expressly put on "acquiescence," and every one of the Lords Justices distinctly said that the *British Museum Case* (2) was "not applicable."

I do not accept Mr. Ronan's contention that the plaintiff is necessarily free from the equitable considerations in question because the change in the character of the locality is chiefly due to circumstances over which she has no control, or to buildings upon neighbouring lands which do not belong to her. The estoppel, where it exists, rests on personal conduct, and the acts which have been done upon her lands, though they have not originated the change, have at least adopted it, and have made a profit of it, and in that point of view might, in kind, suffice to make it inequitable for her to insist against another upon rights to which she herself has paid no regard. But nothing done, at least as yet, by the plaintiff or by her predecessors, has in my judgment involved her own residence of Sydenham House, or the other portions of the property demised in 1854, which still retain the character which was intended to be protected, in the consequences which would follow from permitting the defendants to carry out their intentions. The argument for the defendants, that in such cases restrictions must either be wholly observed or must be altogether forfeited in equity, by a party who seeks to enforce them, is, in my opinion, quite unfounded, either in reason or on authority. In reason it might be tested by asking whether, if a lease contained a covenant against erecting dwelling-houses, and a dwelling-house, in some place which caused no annoyance, was tacitly sanctioned, the lessee would be estopped from restraining the erection of an offensive shop right opposite his own residence. But the authorities are clear, and it is only necessary to refer to *Knight* v. *Simmonds* (3). Kay, L. J., says the alteration of the estate must be a very considerable one indeed, if it prevents the plaintiff from enforcing in equity "the covenant." "If it were to be held that he would lose his right altogether, unless he brought an action against everyone who has infringed

(1) 28 Ch. Div. 103. (2) 2 M. & K. 552. (3) [1896] 2 Ch. 294.

the covenant, although the infringement did him no kind of damage, the object and purpose of the covenant would be lost entirely." Again, "I should hesitate very much before I came to the conclusion that one instance, or it may be half a dozen instances, in which the plaintiff had not taken proceedings to stop the infringement of the covenant, would prevent him from taking proceedings against a man who was infringing the covenant, in such proximity to the plaintiff's house as to do him plainly a great amount of damage." Lindley, L. J., page 290 says, "Some expressions in *Roper* v. *Williams* (1), and *Bedford* v. *British Museum* (2), led to the notion that if a restrictive covenant for the preservation of a building estate was not enforced in all cases, it could not be enforced in equity in any. But this notion was emphatically protested against by the Court of Appeal in *German* v. *Chapman* (3), and its error had been plainly pointed out in *Mitchell* v. *Steward* (4)."

These observations apply here if, as I hold the fact to be, the injurious effect of the defendants' breaches upon the plaintiff's property in Sydenham House is quite beyond any effect produced hitherto by anything done upon the plaintiff's property. Upon the facts I go further, for I say that it is beyond any effect produced by the changes which have hitherto taken place in the neighbourhood generally, even if such changes could relieve the defendants of their contractual obligations. For these reasons, I hold the plaintiff entitled to maintain the injunction on the ground of contract.

The evidence in this case shows that this very distinction between express contract and other obligations was in the minds of the defendants, M'Cann and Braithwaite, and that it rests on fair dealing as understood by ordinary people. In their interview with the plaintiff's husband, and in their evidence, they tried to defend themselves by denying that they intended to break the express covenants. M'Cann says (Q. 470), "I did not think the restrictive covenants covered the grocery we were putting up. We did not intend to put anything there that was specially specified in the lease, a common public-house or standing dram-

(1) T. & R. 18.
(2) 2 M. & K. 552.
(3) 7 Ch. D. 271.
(4) L. R. 1 Eq. 541.

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shop." Unfortunately for him, the restriction upon any kind of shop is exactly the same as that upon those to which he referred. He may not have understood fully that this was so, but his consciousness that he ought not to do anything that was "specially" forbidden by the lease, is a striking proof that the limits which I venture to believe to be fixed by the doctrines of equity, coincide with what are "understood between man and man" to be the limits of actual contract.

The defendants may find it impossible so to alter or use their new structure so as to comply with their obligations, but if that is so, they have only themselves to blame, and liberty to apply as circumstances may require must be reserved to the plaintiff, as a means of enforcing the limited injunction which we retain.

Upon the last point, I hold that Arabella Greer is a proper defendant. She is the lessee. Her consent was necessary to the lease made by her trustees to Braithwaite and M'Cann, and it was only by making her a party defendant that their title was traced from her. But having regard to the fact that the lease to these defendants gave them express notice of the restrictions of 1854; that they took the lease with such notice; that they went on in spite of warning; and that their lease does not expressly authorize any breach of those restrictions; I think that, when the plaintiff's relief is narrowed to the ground of contractual obligation, Arabella Greer is brought rather nearer to the position of the defendant Warren, in *Pembroke* v. *Warren* (1), than to that of the defendant Hort, in *Maunsell* v. *Hort* (2), and therefore that she should abide her own costs only, leaving the defendants, M'Cann and Braithwaite, to pay the plaintiff's costs. I also think that the injunction cannot go against her. Up to the time when she assigned Seville Lodge to the trustees nothing had been done; up to the execution of the lease to the other defendants, no actual damage had been done to the plaintiff, and under that lease the defendants might, in the view which I take of the case, use the place as "building ground" for private dwelling-houses, and possibly for a tea and refreshment-house, and they might use Seville Lodge itself in a way which would not violate the plaintiff's rights. But,

(1) [1896] 1 I. R. 76, 104, 142. (2) 1 L. R. I. 88.

whatever they have done or may do, Arabella Greer cannot now do anything, or prevent them from doing anything, and therefore the injunction ought not to expose her to attachment by including her. She severed in her defence, and we cannot increase her liability because she saved expense by appearing by the same counsel and solicitor with the other defendants.

As the modified injunction may not necessitate the removal of the existing building, if it can be turned either into a private dwelling-house, or into a "tea and refreshment-house" which will satisfy the lease, and as no actual pecuniary loss or damage has been hitherto sustained by the plaintiff, the inquiry as to damages should be discharged, reserving liberty to the plaintiff to apply if the conditions prescribed by the lease of 1854 should fail to be complied with.

The verbal alterations in the decree of the Vice-Chancellor will be considerable, and it will therefore be more convenient to declare that it should be varied, and as varied should stand in the form which will be set out in our decree. But the injunction, as so varied, was resisted, and the defendants, M'Cann and Braithwaite, have failed. Accordingly, the costs of the appeal must follow the same rule as the other costs of suit, that is to say, those defendants will pay the plaintiff's costs, and the defendant, Arabella Greer, will abide her own costs.

WALKER, L. J. :—

I concur. The equity upon which the appellants' case must be put is that on which such cases as *The Duke of Bedford* v. *The Trustees of the British Museum* (1) were decided. I do not think that the cases in which a tract was sold in lots, and where the purchasers entered into covenants with the vendor, or each other, for the benefit of the entire estate and each other, have much application to a case like this, of a single lease—no doubt, a lease contemplating building for its object—but still a single lease between landlord and tenant, with covenants restricting the lessee in certain ways.

(1) 2 M. & K. 552.

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The passage read by the Lord Chancellor from *Sayers* v. *Collyer* (1) shows clearly that the case of *The Duke of Bedford* v. *The Trustees of the British Museum* (2) did not decide that contractual obligations disappeared as circumstances changed. Vice-Chancellor Wood says in *Peek* v. *Matthews* (3) that *The Duke of Bedford's Case* (2) "went upon this, that there was an old covenant between the Duke of Bedford and the Trustees of the Museum, and the intention of both parties having originally been that the two mansions should be specifically kept up, as they were at first, that species of enjoyment was entirely broken through by the erection by the plaintiff himself of a number of buildings in the neighbourhood." Referring to the same case in *Doherty* v. *Allman* (4) Lord Blackburn says (p. 730) :—"What Lord Eldon said was, if he has a right to enforce the contract he may enforce it, but circumstances have been so changed by time that it is unjust and unreasonable to enforce in equity this contract against the British Museum in favour of Bedford-square, though he would enforce it without much hesitation in favour of the Duke of Bedford against Lord Montagu, if they had been occupying their gardens at the time." The test, therefore, would appear to be whether it would be fair or reasonable to enforce the contract.

Thus the application of the doctrine of *The Duke of Bedford's Case* (2) must depend upon the circumstances of each case. It is a question of degree. Here it would be very unjust, not only to the landlord, but also to all the sub-lessees of Waterson who occupy by villas nearly the entire of the tract, if the erection of a few shops at a point distant from Sydenham House would estop the plaintiff from preventing this glaring violation of covenant at the entrance to Seville Lodge. As to what may hereafter be done on Seville Lodge I should rather not express an opinion, as having regard to the date of the lease of 1863, the description of the premises, and the map upon the lease, I doubt if the decision in *Doherty* v. *Allman* (4) goes so far as to establish that an injunction to restrain buildings being erected might not be granted.

(1) 28 Ch. D. 103.
(2) 2 M. & K. 552.
(3) L. R. 3 Eq. 515.
(4) 3 App. Cas. 709.

HOLMES, L. J.:—

Having had an opportunity of reading Lord Justice Fitz Gibbon's judgment, and concurring, as I do, in the conclusions arrived at by him, I feel myself relieved by his exhaustive treatment of the case from examining in detail its facts or law. My only object in adding anything is to state briefly in my own words my view of two or three difficult points in a case which in some of its aspects seems to me to be far from clear.

The foundation of the relief claimed in the action, in so far as it seeks to restrain the defendants from letting or using any building on the lands included in the lease of 1863 for any purpose except as a private dwelling-house, or as a tea or refreshment house are the words in the *habendum* of that demise, "subject to all the provisoes, clauses, covenants, and agreements mentioned and contained in the original lease, by which said premises, with others, are held under the Earl of Ranfurly."

It has been argued, not very strenuously, however, on behalf of the appellants that this clause merely amounts to a warning to the lessee that a superior landlord has rights which may affect their enjoyment of the demised premises, and that it does not import a covenant from the lessee to the lessor. I should have been glad that this proposition had been discussed a little more fully by counsel on both sides. When it was first mentioned, I thought that some plausible arguments might be advanced in support of it; but on further consideration, I find a difficulty in giving any real effect to the words, as between lessor and lessee, if I do not construe them as imposing some kind of obligation from the latter to the former; and as such obligation arises in an instrument under seal, it is in point of law a covenant. What, then, is the nature of the covenant? This is a question of construction; and like the other matter to which I have referred, it is not free from doubt. It has been said that the only object is to protect the lessor in the event of his being made liable on his own covenant to his landlord, by reason of something done or omitted by the sub-lessee on the lands contained in the latter's lease. It may be argued that if what was contemplated was a stipulation for the general benefit of the lessor,

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irrespective of his own obligations, this would have been effected by an independent covenant, which could not be got rid of by the consent of Lord Ranfurly. As the lease of 1863 now stands, every covenant of any importance, as far as this action is concerned, which is imported into it from the lease of 1854, is a covenant dependent on the head landlord's consent; and while the fee and the interest under the lease of 1854 were vested in different persons, the owner in fee, by his consent in writing, given to the sub-lessee, could free the latter from these covenants. These considerations point to a construction that would measure the obligation of the sub-lessee to his immediate lessor by the extent and duration of such lessor's covenants with Lord Ranfurly by reading the implied covenant in the lease of 1863 as a covenant with the lessor to observe the covenant contained in the lease of 1854, as long as the lessor herself was bound thereby.

This is I think a possible construction; and if it be the true one it would follow from it that when Ferguson being at the time owner of the lease created in 1854, purchased the reversion in fee-simple expectant thereon, all liability under the covenant implied from the words already quoted from the lease of 1863, ceased, not by reason of the technical doctrine of merger, but because the covenant on its true construction had come to an end. After some hesitation I have come to the conclusion that the construction which I have mentioned is not the true one. The object of the parties is one thing; the mode in which they carry out their object is another. If, "subject to the covenants in the lease of 1854," implies a covenant from the sub-lessee with his lessor to observe those covenants in relation to the sub-demised premises, it would be an undue limitation of the obligation thus undertaken to construe it as a mere indemnity against liability arising from acts of the sub-lessee. It must I think be regarded as conferring on the lessor all the benefits of an independent covenant with himself.

But, even if I am wrong in the foregoing conclusions, the plaintiff has another—a shorter and possibly a better answer to the defendants' arguments—an answer that makes the contractual relations between the lessor and lessee of 1863 immaterial except, perhaps, for the purpose of affixing on Miss Greer liability in a claim for damages.

It is argued that whatever may be the rights of the lessor of 1863 against his lessee, the head landlord was in any case entitled to restrain by injunction the latter from acting in violation of the covenants in the lease of 1854, not by reason of a contractual relationship which did not exist as between them, but because such lessee had taken a demise with notice of the covenants affecting his lessor's interest. It was further argued that if this was Lord Ranfurly's right, it passed with his reversion to his grantee; and that it has not been extinguished by merger or otherwise. These propositions seem to me to be sound, and are in themselves a sufficient foundation for the judgment of the Court.

At the same time if the lessee of 1863 is subject to the equity to which I have referred, he seems to me to have a corresponding equity. When Lord Ranfurly made the first demise, he separated premises therein contained from the rest of the property in the neighbourhood of which I presume he was the owner, taking from his lessee covenants for his own benefit, and stamping thereby on the leased lands a certain character. His doing so (as far as appears from the evidence in this action) had no relation to and was not connected with any intended user of the surrounding lands; and I agree with Mr. Ronan's proposition that the lessee would not have been relieved from his covenants if his landlord had covered the property he retained with public-houses, shops, or factories. I think, however, that Waterson and his assignees stood and stand in a different position to Miss Greer. When by the lease of 1863 she became bound to observe in her dealing with the half-acre demised to her the covenants in the head lease, it was well known both to her and her lessor that those covenants attached to upwards of eleven acres adjoining, and that if she had a burden imposed on her own holding, she would enjoy the benefit that her holding would derive from a neighbourhood of private houses. This appears to me to make the case analogous to *The Duke of Bedford* v. *The Trustees of the British Museum* (1) and the building scheme cases; and I should be prepared to apply the principle of those decisions to the present action, if the other facts permitted me to do so. If, for example, Waterson or Ferguson had either

(1) 2 Myl. & K. 552.

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before or after the fee was acquired converted the rest of the twelve acres into streets of shops or stores, I am of opinion that this action for an injunction could not have been maintained. They would have been disabled by their own conduct from enforcing specific performance of the covenant.

The question however is, whether what has actually happened deprives the plaintiff of this right. She has undoubtedly erected on portion of the premises included in the lease of 1854, houses that do not accord with the covenants, and let some of them for shops. This is really the critical portion of this branch of the case; and I have considerable difficulty in deciding it; but on the whole, I concur in thinking that the plaintiff is not estopped by what has been called a personal equity. By far the larger portion of the premises demised in 1854 is in the same position now as it was in 1863; and the provisions of the lease are observed in regard to it. What has been lately done on a small part of those premises has not, in my opinion, interfered with the amenity, either of the lands as a whole, or of Seville Lodge in particular; and Miss Greer continues to enjoy substantially everything that the existence of the covenant led her to expect.

For these reasons, I am of opinion that the first part of the Vice-Chancellor's judgment ought to be upheld, although I confess that my determination, especially as regards the last-mentioned point, has been attended with doubt and hesitation.

I feel myself on firmer ground in dealing with the second branch of the case. Yet even here, I do not forget that it has caused Lord Justice Walker more difficulty than the other.

The waste relied on, as I understand the argument, is the change in the character of the property. But before a tenant can be made answerable for waste of this nature, it must be shown that the character claimed has been stamped on the property by the terms of the demise. Here all that appears from the lease of 1863 is that the lessee had rebuilt a dilapidated house called Seville Lodge at the cost of £800. A map endorsed shows that this was the only residence at that date on the lands, and that there were two approaches to it; and there is the usual covenant to keep the demised premises and all improvements made and to be made thereon in good order,

repair, and condition. But how does it appear from anything in the instrument that during the term of 800 years no additional house was to be erected on the lands? Seville Lodge is still standing and available as a dwelling-house. It was a very modest residence at all times, and is so still. The area demised is two roods and twenty-three perches; and there is ample space on it for another building. It is somewhat curious that the second branch of the case, if not inconsistent with the first, reduces the argument thereon to surplusage. The covenants imported into the lease of 1863 from that of 1854, contemplate the erection of private dwellings; but what need is there to discuss their effect, if the terms of the lease of 1863 preclude the tenant from using the lands thereby demised for any purpose except as the grounds and curtilage attached to a single villa.

Being unable to accept this construction of the instrument, I concur in discharging the injunction in so far as it restrains the alleged waste.

As these observations are only supplemental, I have for the sake of brevity dealt with the case as if Miss Greer was the sole defendant, and as if she had herself committed the acts complained of, whereas in point of fact they were committed by the other defendants who are the lessees of her assignees. They have no better answer to the claim for an injunction than she would have had if she had actively participated; but I agree with Lord Justice Fitz Gibbon's reasons for discharging the injunction as against her, and I also concur in holding that for the present no judgment should be given as to damages.

Solicitors for the plaintiff: *Carson & M'Dowell.*
Solicitor for the defendants: *Samuel Ross.*

G. Y. D.

M. R. 1899.

March 27.
April 18.

In the MATTER of the TRUSTS of the WILL of ELIZABETH HALL, deceased.

SHEIL *v.* CLARK.

(1899. No. 144.)

Power — Construction — Whether coupled with a trust — Fund bequeathed to trustees upon trust to pay the income to A. for life, with power to "demise" the fund to such of her brothers or sisters, or their children, as she should think proper — Power executed in favour of a niece, who predeceased the donee — Residuary gift.

A testatrix bequeathed the sum of £3000 upon certain trusts, and, amongst others, upon trust to pay the interest on a sum of £500, part thereof, to her niece Rebecca, for life, or until she should be married, in which event she directed the said sum of £500 should be settled. The testatrix then declared the trusts of other portions of the £3000 in favour of her nieces Anne and Frances, and declared that it was her will and desire that her said nieces, or such of them as died unmarried, should have power to demise (*sic*) the above-mentioned legacies to such of their brothers and sisters, or their children, as she or they should think proper. The will contained a residuary gift to a sister of the testatrix.

Rebecca died without having married. By her will she left the £500 so bequeathed to a sister who predeceased her.

Held, that there was no trust for the objects of the power, and that the sum of £500 fell into the residue.

Originating Summons to take the opinion of the Court on behalf of the trustees of the will of Elizabeth Hall as to whether the legacy of £500, bequeathed by the will of the testatrix upon trust for her niece Rebecca Hall for life, reverted on the death of Rebecca Hall to the residuary estate of the testatrix, or whether the power given by the said will to Rebecca Hall to devise the said legacy to such of her brothers or sisters, or their children, as she should think proper, created a trust in favour of such of the objects of the power as were living at the death of Rebecca Hall.

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The material parts of the will (which was dated 1st May, 1836) were as follows:—"I leave and bequeath to my brother William Hall the sum of £3000 upon trust at the expiration of two years from my death to pay £500 part thereof to my niece Jane Sheil; but in case my said niece Jane Sheil shall die in my life time I give devise and bequeath the said sum of £500 to such daughter or daughters of the said Jane Sheil as shall be living at her death, and in case she should so die without leaving any daughter her surviving then I devise the said sum of £500 to her sons William Sheil, John Sheil and Richard Sheil, to be divided equally between them or the survivors or survivor, and if none of them shall be living at the time of her death then I leave the said sum of £500 equally among such other sons of the said Jane Sheil as shall be living at the time of her death." The will then disposed of another sum of £500, part of the said £3000, to Elizabeth Andrews, another niece of the testatrix, with similar gifts over to her children, in the event of her predeceasing the testatrix. Then followed the legacy to Rebecca Hall:—"And upon trust to pay the interest of the sum of £500, other part thereof, to my niece Rebecca Hall for and during the term of her natural life, or until she shall be married, and upon her marriage upon trust to pay the interest of the said sum of £500 to the said Rebecca Hall for her own sole and separate use, and not to be subject to the debts, contracts or engagements, or to the control of such person as she shall intermarry with, her receipt alone to be a sufficient discharge from time to time for the interest of the said sum of £500, and I hereby order and direct that the said William Hall his executors administrators or assigns shall cause the said sum of £500 to be settled upon the marriage of my said niece Rebecca Hall upon the trusts aforesaid." The will then disposed of another sum of £500 in precisely the same manner in favour of Anne Hall, and of a sum of £1000, being the balance of the £3000, in favour of Frances Hall, and proceeded thus: "But in case my said nieces Rebecca, Anne and Frances, or any or either of them, shall die unmarried, then and in such case it is my will and desire that my said nieces or such of them as shall not be married during their lives shall have power to demise (*sic*) the above-mentioned legacies of £500 each given

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to the said Rebecca Hall and Anne Hall respectively, and the said sum of £1000 bequeathed to said Frances Hall, to such of their brothers or sisters or their children as she or they shall think proper." The testatrix appointed her brother William Hall and her sister Anne Hall, or whichever of them should be living at her decease, residuary legatees or legatee and executors or executor.

The testatrix executed a codicil to this will, dated 24th July, 1837, and thereby reciting that her brother William Hall had predeceased her, substituted for his name as trustee of the £3000 the names of Ninian Boggs M'Entire and James Sheil.

The testatrix died 3rd April, 1841, and the will and codicil were proved by Anne Hall, 1st May, 1841.

Rebecca Hall did not marry. She made her will on the 19th August, 1879, and thereby gave and bequeathed the sum of £500 left her by her aunt Elizabeth Hall to her sister Frances Clark. Frances Clark died 19th March, 1892, and Rebecca Hall died 19th December, 1897, without revoking her will, and the same was proved, 11th March, 1898, by one of the plaintiffs.

The plaintiffs were the trustees of the will of Elizabeth Hall, in whose name the £500 was still invested. Four of the defendants were the executors of the surviving executor of Anne Hall, the residuary legatee of Elizabeth Hall, and were also the personal representatives of Elizabeth Hall. There were also named as defendants some of the persons beneficially interested in Anne Hall's residue, and some of the persons who were objects of the power given to Rebecca Hall.

Mr. Robert Sheil, one of the plaintiffs, made an affidavit verifying the facts.

Twigg, Q.C., for the trustees.

The Right Hon. The MacDermot, Q.C., for Mrs. Ireland and Mrs. Morton, objects of the power:—

This is a power coupled with a trust: the power has not been exercised and the trust will be carried into execution among all the objects equally. The Court always attaches great weight to the words "it is my will and desire," and carries out the desire

and intention of the testator by enforcing the trust: *Forbes* v. *Ball* (1); *Birch* v. *Wade* (2); *Burrough* v. *Philcox* (3); *Re Brierley* (4). The frame of the will here shows an intention that the £500 should be entirely disposed of by the trusts declared, and that it should not fall into the residue. Reading the will according to our contention the legacy is completely settled.

G. Y. Dixon for the personal representatives of Elizabeth Hall and Anne Hall:—

In the events that have happened, the £500 passed under the residuary gift to Anne Hall. There is no trust here: the words of the will, "it is my will and desire that Rebecca Hall shall have power to devise," are not imperative; they only confer a power—they impose not trust or duty. The difference between a trust and a mere power depends on whether the language of the will is imperative: *Brook* v. *Brook* (5); *Crossling* v. *Crossling* (6); *Healy* v. *Donnery* (7); *In re Weekes' Settlement* (8). In *Forbes* v. *Ball* (1), and *Birch* v. *Wade* (2) there was gift to a class with a power of selection to the donee. In *Burrough* v. *Philcox* (3) the property was by the very terms of the will to be completely disposed of by the trusts declared. The point raised here was left undecided in *Re Brierley* (4). Here the testatrix does not declare trusts which necessarily completely dispose of the £3000; if Mrs. Sheil and her children all died in the lifetime of the testatrix the £500 left to Mrs. Sheil would have fallen into the residue. Why should not the same result befall the £500 provided for Rebecca Hall in the events that have happened? [He also cited *Moore* v. *Efolliott* (9), and *Ahearne* v. *Aherne* (10).]

Poole, for the beneficiaries under Anne Hall's will.

THE MASTER OF THE ROLLS:— April 18.

The controversy in this case is whether under the will of Elizabeth Hall a sum of £500, in which in the events which happened Rebecca Hall took only a life estate with a limited

(1) 3 Mer. 441.
(2) 3 V. & B. 198.
(3) 5 My. & Cr. 73.
(4) 43 W. R. 36.
(5) 3 Sm. & G. 280.
(6) 2 Cox. Ch. C. 396.
(7) 3 Ir. C. L. R. 213.
(8) [1897] 1 Ch. 289.
(9) 19 L. R. Ir. 499.
(10) 9 L. R. Ir. 144.

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power of appointment, fell into the residue of Elizabeth's estate on the death of Rebecca—not having passed under any appointment—or whether it is impressed with a trust for the objects of the power. Those interested in each of these contentions are represented before me.

The facts, so far as necessary for the present purposes, are set out in the affidavit of Robert Sheil, one of the plaintiffs. He says: [The Master of the Rolls here read from the affidavit which set out the facts as they are stated *ante*, pp. 309, 310.]

Rebecca, therefore, had no more than a life estate with a power to appoint. She made an appointment by her will which would have been valid but for the fact that the appointee died in her life-time. There was therefore no appointment; and the question is whether the fund representing the legacy forms part of Elizabeth's residue — or whether it is held in trust for Rebecca's "brothers and sisters, or their children," who were living at her decease.

It is always to be borne in mind that Rebecca took no estate beyond her own life interest. She had therefore in the legacy no property of which she was a trustee. If the objects of the power have an equitable interest, it must be by virtue of a trust attaching upon the trustees of the £3000 and their successors, or upon the money itself—and not upon any interest of hers. The fund was withdrawn from the assets and vested in trustees, and this circumstance was relied on by The Mac Dermot as indicating an intention to dispose of it finally. No doubt it affords an argument of moment in the consideration: but it is far from being conclusive—since had the trusts of the £3000, or any part of it, failed, or come to an end from any other cause, there is no doubt that there would have been a resulting trust for the estate of the testatrix, or her residuary legatee: and the question is simply whether that has happened. It is also the fact that the directions as to the marriage settlements of Rebecca, Anne, and Frances do not exhaust the possible or probable events, as the trusts expressed do not go further than their life estates; but there is an executory direction to settle the fund—which would be carried out by the trustees or under the direction of this Court by framing a proper marriage settlement with the usual provisions; and

such provisions, which would include every event, must really be taken as part of the will. In the clause under consideration too there is no gift over even in the possible event of Rebecca dying unmarried, and without leaving objects of the power (brother or sister, or the child of a brother or sister), her surviving; that is, there is no gift over either in default of appointment or in default of objects. Notwithstanding that the residuary legatees, William and Anne, were not objects of the power, it is conceivable that the testatrix may have regarded the residuary clause as providing for its non-execution, although on the question of construction a residuary clause cannot be treated as equivalent to a gift over in default: *Brierley* v. *Brierley* (1). For of course a gift over in default of appointment usually negatives the idea of a trust for the objects in any event—just as a gift over in default of objects usually implies such a trust. The question in all cases of this description is as stated by Lord Eldon in *Brown* v. *Higgs* (2).

In both *Brown* v. *Higgs* (2) and *Ahearne* v. *Aherne* (3), the testator had given to the donee of the power an interest extensive enough to enable him to discharge the duty of exercising it, if such duty there were; and in such cases (of which this is not one), it is easier to infer a trust than where there is power only: In *Brown* v. *Higgs* (2), Lord Eldon, says, at p. 569:—"It is perfectly clear that, where there is a mere power of disposing, and that power is not executed, this Court cannot execute it. It is equally clear that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this Court will execute the trust. One question, therefore, is, whether John Brown had a trust to execute, or a power, and a mere power?" Where, then is the trust to be found in this will? If at all, it must be in the words, "it is my will and desire . . . that my nieces shall have power to demise . . . to such of their brothers or sisters or their children as they shall think proper." These words, apart from cases and decisions, are clearly enabling and not imperative. It is said the words "will and desire" create a trust; of course they might well do so: but do they here? They mean no more than that "it is my will and desire, that my nieces may appoint if they

(1) 43 W. R. 36. (2) 8 Ves. 561, p. 569. (3) 9 L. R. Ir. 144.

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choose," and no amount of emphasis in the enabling words can make them mandatory. The nieces are to have power to appoint. That does not mean that it is their duty to appoint. If they appoint, it is to be "as they shall think proper." They may appoint to brothers, *or* sisters, *or* their children. What if they do not think it proper to do so: if, for instance, they regarded all of the class as undeserving? Is there still a trust for the class? Apart from decisions, I think there could be no doubt as to the intention: viz. to leave it simply at the discretion of the nieces whether they would or would not leave the legacies to members of the class—the destination of it, if unappointed, being determined by the residuary gift.

In *Forbes* v. *Ball* (1) the words "will and desire" occur as here: "I give to my dear wife Ann Cotterel the sum of £500, and it is my will and desire that my said wife may dispose of the same amongst her relations as she by will may think proper"; and it was held that there was a trust for her relations. The words have a resemblance to those before me; but the case is clearly distinguishable on at least two grounds. Ann Cotterel took, in the first instance, the absolute interest in the £500. No life estate is expressly limited to her. She had therefore an interest sufficient to perform the trust, if there was one. Further, she did appoint. There was a question whether what she did was a valid exercise of the power; but Sir William Grant held it was. It is stated, p. 439:—"The plaintiffs insisted that Ann Cotterel never executed, or intended to execute such power of appointment, and therefore the £500 fell into, and then formed part of, the residuary estate of the testator. The defendants, on the contrary, insisted that the power was well executed by the will of Ann Cotterel; or, if not, that it was a trust for her relations subject only to her life interest, and, if so, in default of appointment, the defendant Mrs. Ball as her next-of-kin would be entitled absolutely. And they cited *Harding* v. *Glynn* (2); *Brown* v. *Higgs* (3); *Cruwys* v. *Colman* (4); *Birch* v. *Wade* (5), &c. Upon this point the Court was of opinion that the words in the testator's will

(1) 3 Mer. 437.
(2) 1 Atk. 469.
(3) 8 Ves. 561.
(4) 9 Ves. 319.
(5) 3 V. & B. 198.

raised a trust for the wife's relations, subject to her appointment; and that the same was well executed by her will in favour of her sister and her sister's children, and decreed accordingly."

The case is imperfectly reported; but in no view of it can it be treated as an authority ruling the present one. The testator's will and desire was that his wife should dispose of the property; and the word "dispose" is the key. Here it is that she shall have power to devise.

Romer, J., says (1) of *Forbes* v. *Ball* (2):—"*Forbes* v. *Ball* (2) is very shortly reported. It was held that the power had been exercised, and there is only a short statement that 'the Court was of opinion that the words in the testator's will raised a trust for the wife's relations, subject to her appointment.' That is all that is stated on that point; but if that was decided, then it is clear, at least to my mind, that it is a decision upon the particular wording of the will which was as follows:—'I give to A. C. £500; and it is my will and desire that A. C. may dispose of the same among her relations, as she by will may think proper.' The Court must have held, I have no doubt, that by force of the words 'my will and desire' there was a sufficient indication of the intention of the testator that A. C. should dispose of it. The words 'my will and desire' might be said (especially as the authorities on precatory trusts then stood) to be incompatible with the idea that a mere power was given to A. C. which she might or might not exercise at her option. That case is no authority for the general proposition."

The learned Judge who in the same context refers to the case of *Birch* v. *Wade* (3), says:—"It is clear, in my opinion, from the judgment in *Birch* v. *Wade* (3), that the true ground of the decision there was that the power was in the nature of a trust by force of the words that had been used by the testator of his 'will and desire.'" In *Birch* v. *Wade* (3) the same (very common) words "will and desire" occur. I cannot think that "will and desire" means more than "will" *or* "desire" separately, or than "wish" or "direct." Any of these forms of expression is sufficient to indicate a testamentary intention; and with all deference I am not sure that the case turned upon those words. I think it probable

(1) [1897] 1 Ch. p. 296. (2) 3 Mer. 437. (3) 3 V. & B. 198.

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that it depended more or at least as much upon the words which followed. These or similar words (will and desire) are expressed or implied in every testamentary disposition. The words were:—"It is my will and desire, that the other third part of the principal of my estate and effects be left entirely to the disposal of my dear and loving wife among such of her relations as she may think proper after the death of my aforesaid sisters." The Master of the Rolls there says:—"After the best consideration I can give this case, it does not appear to me to differ materially from the cases of *Harding* v. *Glynn* (1) and *Brown* v. *Higgs* (2). What the testator wills and desires by this clause is that one-third of the principal of his estate and effects shall be left entirely to the disposal of his wife among such of her relations as she may think proper after the death of his sisters. It is to be left, not to her disposal, generally, but to her disposal among a particular class of persons; leaving it to her to select from that class such individuals as she shall think proper. We cannot stop in the middle of the clause; and say, all, that he willed and desired was, that she should have the disposal of one-third; but that it was no part of his will and desire, that her relations should have the benefit of that disposition. I think the intention was that her relations, at least such of them as she should designate, should have the benefit of that third. He had already made a disposition in favour of his own relations; and given them everything he intended to give them. According to the frame of his will, giving life interests to different persons after his wife's death, he could not give any part of the capital to her directly; but it was not unnatural to substitute her relations in her place with regard to that portion of his property, which he did not choose to give to his own; and, I think, that is what he meant; leaving it to her to designate the persons and their shares. Then it is the same as *Harding* v. *Glynn* (1); and her relations, living at her death, will be entitled; though there was no selection made by her."

In *Burrough* v. *Philcox* (3), Lord Cottenham, after six months' consideration, thought himself justified in giving effect to what he held to be the intention, viz., that the class of objects of the

(1) 1 Atk. 469. (2) 8 Ves. 561. (3) 5 Myl. & Cr. 73.

power were to take beneficially in the absence of any selection by the donee of the power.

At p. 88, Lord Cottenham says:—

"The testator directed the dividends of £6000 stock, then standing in his name, to be paid to his daughter for life, and he directed that the stock should remain in his name 'until the following contingencies are completed.' After the death of his daughter, he disposed of the stock for the benefit of her children, and if she should not leave children, he gave the dividends to his son for life, and, after his decease, the principal to his children; 'but if my daughter and son should both of them die without leaving issue, then for it to be disposed of as hereinafter.' He gave to trustees and their heirs certain estates, describing them 'for the following uses. My intention is, that my said trustees shall have no further trouble in it, than to prevent the afore-mentioned estates being alienated before the following contingencies are completed.' He then gave the rents to his son for life, and after his death to his son's sons and daughters, in terms which, I think, would have given to those sons and daughters estates tail, and upon failure of such issue of his son, he gave his estates to his daughter, Ann Fox Walton, for life, and after her death to her son, if any; 'but in case my son and daughter should both of them die without leaving lawful issue, then for the said estates to be disposed of as shall be hereinafter mentioned, that is to say, the longest liver of my two children shall have power by a will, properly attested in writing, to dispose of all my real and personal estates amongst my nephews and nieces, or their children, either all to one of them, or to as many of them as my surviving child shall think proper." . . . "In this case the intention is not to be found only in the power given to select and distribute; for the testator has directed his trustees to hold the property until the contingency has happened, and, as to the land, that it shall not be alienated in the meantime, and has himself declared, that, in the events which have happened, the property should be disposed of as after-mentioned. This is imperative, and is conclusive as to the intention that the subsequent gift should take effect; but the only disposition after-mentioned is

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the provision for the nephews and nieces and their children, subject to the selection and distribution of the survivor of his son and daughter."

The intention was finally "to dispose of" the property by the gift in question, in that respect resembling *Birch* v. *Wade* (1).

In *Crossling* v. *Crossling* (2) the words were to testator's wife for life: "And she *shall* dispose of the same amongst my children by her at her decease, as she shall think proper." The question arose as between the heir-at-law and the other children, on an application by the latter in the Equity Exchequer, founded on the argument that the language is imperative and created a trust. "But the Court said that the cases alluded to (which in general arose upon bequests of personal estate) were cases in which a fund was by the will given *absolutely*, but after such bequest there followed words of *desire* or *recommendation* in favour of certain persons after the death of the first legatee; there the Court had holden the first legatee to be a trustee for the persons so recommended, and had given the fund accordingly after his death; but in this case there was an express devise of a real estate to the wife for *her life*, with a *power* for her to dispose of it amongst the children, which power she never executed."

In *Brook* v. *Brook* (3) the estate was devised in words sufficient to carry the fee-simple, with a superadded power to appoint amongst a class. It was held by Stuart, V. C., that the power created no trust in favour of the class, and that the first taker was entitled absolutely. This point does not arise here.

Healy v. *Donnery* (4), a case in the Court of Exchequer in this country, bears a closer resemblance to the present case.

The words of the will there were:—"I leave, devise and bequeath unto my said daughter Margaret Healy all my freehold interest in North King-street in the city of Dublin upon trust to receive the rents, etc. thereof for and during the term of her natural life, for her own sole use, etc., notwithstanding her coverture, without the control of her present or any future husband, etc., with power to my said daughter, by any deed

(1) 3 V. & B. 198.
(2) 2 Cox Ch. Cas. 396.
(3) 3 Sm. & Gif. 280.
(4) 3 Ir. C. L. R. 213.

or will, to dispose of, devise or bequeath the said freehold estate to and among her children, in such shares and proportion as she shall think fit and proper."

Pennefather, B., in giving judgment says:—

"It is argued that the power to appoint among the children is tantamount to a trust created for them. I have always considered that there was a distinction between a mere power and one coupled with a trust; and though I called on counsel for an authority to the contrary, no such case has been cited. But particular cases have been cited, in which Courts have thought that they collected from the peculiar words of the power, an intention of the testator to give to children in default of appointment. The general position contended for by the defendant's counsel has never been laid down; and I cannot say that this case falls within the authority of any of the cases cited. What would be the meaning of all those efforts to find whether trusts can be spelled from the particular language of powers, if the general principle contended for existed?"

Healy v. *Donnery* (1) was recognised and followed by Romer, L. J., in *Weekes' Settlement* (2) to which I have already referred:—The words there were: "I bequeath to my husband James Slade a life interest in all property real or personal which may come to me in accordance with the will of my late father Richard Weekes and also in the house which I took under the will of my late cousin George Weekes and I give to him power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards the other property which I have under my marriage settlement. I also bequeath unto him the said James Slade all my effects clothes jewellery and other articles to be at his entire will and disposal." The learned Judge says, at p. 293:—"Now do the authorities bear out what I have stated? One of them, an Irish case, *Healy* v. *Donnery* (1), clearly tells against the proposition contended for. In that case there was a gift of a freehold interest to a daughter for life, with power by deed or will to dispose of the same to and among her children, with no gift over in default of

(1) 3 Ir. C. L. R. 213. (2) [1897] 1 Ch. 289.

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appointment. There was indeed a residuary gift, but that, as pointed out by the Court of Appeal in *In Re Brierley* (1), is not equivalent to a gift over in default of appointment for the purposes of the above proposition. The case, therefore, was merely a devise for life, with power by deed or will to appoint the remainder to and among the children, and that was held not to give an estate by implication to the children. The proposition now contended for was then urged also by the party who failed, and was thus dealt with by Pennefather, B., in his judgment." [The learned Judge then quotes the passage I have read from that case.]

In Mr. Farwell's very useful work on Powers, 2nd edition, at p. 466, the rule is stated to be as follows:—"If there is a power to appoint among certain objects, but no gift to those objects, and no gift over in default of appointment, the Court implies a trust for or a gift to those objects equally, if the power be not exercised." This proposition is in terms confined to cases where there is no gift over in default of appointment. If it is intended to apply only where there is no residuary gift which would capture any unappointed fund or share, it has no application to the present case. I do not think, however, the learned author meant it to be so restricted. Taking that to be so, the proposition cannot be regarded as universally true. If it were true to a full extent, it would include this case; but I am clearly of opinion that there is no rule of law binding me to decide against what I consider to have been the intention of the testatrix. The unappointed fund falls into the residue of the testatrix Elizabeth Hall's estate.

Solicitors for the trustees: *Bowles & French.*

Solicitors for Mrs. Ireland and Mrs. Morton: *Whitney & Moore.*

Solicitors for the personal representatives of Elizabeth Hall and Anne Hall, and for the beneficiaries under Anne Hall's will: *Martin, King, French & Ingram.*

W. L.

(1) 43 W. R. 36.

HERRICK *v.* COOPER.

V.-C. 1899. April 26.

(1899. No. 293.)

Practice—Originating summons—Jurisdiction—Whether executors liable to account for income of third party received by testator—Question arising in the administration of estate—Order LV., Rule 4 (g).

A. supported and took care of B., an aged relative, for some years, during which time she received income of B. to an amount exceeding the expenditure upon her. After the death of A. and B.:—

Held, that the question, whether A.'s executors were bound to account to B.'s administrator for the income so received was not a question arising in the administration of the estate of A. within Order LV., Rule 4 (*g*).

Originating Summons.

In July, 1894, Maria T. Cooper, who was then over eighty years of age, and in a state of dotage, and was possessed of considerable property, was taken by her niece Barbara B. Cooper, to live with her. Barbara B. Cooper thenceforth maintained her aunt in comfort, keeping an extra servant and, for a time, a lady companion, for her, but receiving the greater portion of her income.

Barbara B. Cooper died on the 21st February, 1897; her aunt died on the 14th March, 1897.

John H. B. Herrick and Henry G. Cooper were the executors of Barbara B. Cooper.

From an account kept by Barbara B. Cooper, and an estimate made after her death, it appeared that she had received considerably more of Maria T. Cooper's income than she had spent on her support, the income received having been about £430 per annum, and the expenditure about £230. In the schedule for probate purposes the executors accordingly took credit for £500 as a debt due by Barbara B. Cooper's estate to that of Maria T. Cooper.

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Soon after the death of Barbara B. Cooper one of her aunt's next-of-kin wrote to one of the executors stating that an account would be required of the income of the said Maria T. Cooper received by Barbara B. Cooper.

On the occasion of taking Maria T. Cooper to live with her Barbara B. Cooper informed the said John H. B. Herrick that she expected to receive the income of her aunt, as she alone was to take care of her and defray all expenses for her.

In April, 1897, one of the said executors furnished to the solicitor of the administrator of Maria T. Cooper a statement showing particulars of her assets, in which was included her income uncollected at her death, with a note at foot stating that that income was assets of Maria T. Cooper, but that, except for the last three weeks of her life, it was due to the executors of Barbara B. Cooper, as the former resided with the latter, who paid all expenses for her.

The administrator adopted that statement, and did not include in the schedule of Maria T. Cooper's assets anything in respect of her income received by her niece, and he subsequently stated that he did not intend to claim an account in respect of that income. On the 8th February, 1899, however, his solicitor wrote to one of the executors stating that the next-of-kin of Maria T. Cooper had called upon him to demand an account of her income, and asking for same.

The executors had paid all other claims against the estate, had nearly completed the administration of the assets, and all other questions relating to the same had been disposed of.

The executors of Barbara B. Cooper took out this summons in the matter of her estate, and between themselves as plaintiffs, and the administrator of Maria T. Cooper and the residuary legatees of Barbara B. Cooper as defendants "for the determination of the following question arising in the administration of the estate of the said Barbara B. Cooper without an administration of the said estate, that is to say, whether the defendant W. A. Cooper, as the administrator of Maria T. Cooper, deceased, is entitled to an account of the income of the said Maria T. Cooper received by the said Barbara B. Cooper."

An affidavit stated the facts summarized above.

Price, *Q.C.*, for the plaintiffs, in support of the application:—

[The Vice-Chancellor inquired how this application came within Order LV., Rule 4.]

It comes under heading (*g*): it is a question arising in the administration of the estate. The estate has been otherwise fully administered and the residue ascertained, and the question is whether the executors are bound to render an account of the income of Maria T. Cooper received by their testatrix.

[The Vice-Chancellor said the same might be said of any creditor's claim; the claim in question was one for money had and received; he would not allow the application of the Rule to be extended.]

Ball, for the administrator of Maria T. Cooper.

H. Richards, for the residuary legatees.

THE VICE-CHANCELLOR held that the case did not come within Order LV., Rule 4, and made no rule on the application.

Solicitor for the plaintiffs: *H. G. Cooper.*
Solicitor for the defendant, the administrator: *Shannon.*
Solicitor for the residuary legatees: *Molony.*

D. M'C. M.

M. R.
1898.
Nov. 28, 30.
Dec. 9.

In re PATTERSON, Deceased.

DUNLOP *v.* GREER.

(1898. No. 1106.)

Will—Principles of construction—Reading in words—Invalid appointment—Implied trust—"Empower"—"Blood relations"—Next-of-kin taking per capita.

In construing wills it is the duty of the Court to ascertain, if it be possible, what the testator really meant from the language he has used. The exact words are not to be followed in their literal meaning if it be plain that to do so would frustrate the real intention of the testator. If, from a consideration of the whole will, it is plain that to place a literal meaning upon one clause would have the result of defeating the clear intention, it is necessary even to do violence to the language used. The thing to be ascertained is, what is the testator's will.

After certain other dispositions of his residuary personal estate a testator provided as follows:—"I empower the survivor of them [the testator's two brothers] by deed or will to appoint the said personal estate to and amongst my blood relations in such shares and subject to such limitations as he may think fit." There was no gift of the residue in default of appointment. J., the surviving brother of the testator, who took a life interest in the residuary personal estate, by his will purported to make an appointment of the residue in favour of three cousins, having allocated merely nominal sums to the children of a deceased sister, a living sister, and her children.

Held, that the appointment to the cousins being invalid, there was an implied gift in favour of the class who would have taken under an exercise of the power, and that the class entitled were the next-of-kin, who were to be ascertained at the date of the death of the tenant for life.

Held also, that the objects of the power under the implied trust, in default of appointment, took in severalty and *per capita*.

Alexander Patterson made his will, dated 17th March, 1887, the material parts of which were as follows:—"I appoint Thomas Mac Gregor Greer of Ballymoney, in the county of Antrim, and my brother John Patterson of Drumlee, hereinafter called my trustees, to be the executors and trustees of this my will, and I

devise and bequeath all my real and personal estate whatsoever and wheresoever unto my trustees, upon the trusts following, that is to say, in trust as to my lands and hereditaments in the townland of Knockans, for my brothers John Patterson and Samuel Patterson, as tenants in common, for their respective lives, and from and after their decease, respectively, for their respective wives and children, in such shares as they shall respectively appoint, and in default of appointment for such wives and children equally; and in the event of any of my said brothers dying without leaving any wife or children him surviving, then it is my desire that the share of such deceased brother in the said hereditaments and premises shall from and after his decease be held in trust for my surviving brother for his life, and after his death for his children, in such shares as he shall appoint, and in default of appointment for such children in equal shares; but in the event of my two brothers dying without leaving any issue, then the said hereditaments and premises shall, on the death of the survivor of them, be held in trust for my nephew David Dunlop, the son of Alexander Dunlop of Drumlee absolutely, and I declare that my trustees shall stand possessed of my personal estate and money lent on mortgage, upon trust either to permit the same to remain in its present investments, or at their discretion to sell, call in, and convert into money the same, or such part thereof as shall not consist of money, and shall with and out of the moneys produced by such sale, calling in, and conversion, and with and out of my ready money, pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will, or any codicil thereto, and invest the residue of the said moneys in such stocks, shares, mortgages upon freehold or leasehold property or upon personal security as to my trustees shall seem desirable, and shall stand possessed thereof upon trust to pay the interest or annual income to arise therefrom to my said brothers Samuel Patterson and John Patterson during their joint lives in equal shares, and from and after the death of either of them to pay one moiety of my residuary personal estate to his wife and children in equal shares, and in the event of his dying without leaving a wife or children him surviving, then upon trust to pay the entire of the interest or annual proceeds thereof to my surviving brother during his life, and from

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and after his decease, then upon trust as to my entire residuary estate to pay the same to and amongst his children in such shares as he shall appoint, and in default of appointment to such children equally. In case, however, the said Samuel Patterson and John Patterson shall not have any child or children, then I empower the survivor of them by deed or will to appoint the said personal estate to and amongst my blood relations in such shares and subject to such limitations as he may think fit."

The testator Alexander Patterson died on the 23rd April, 1887, without having altered or revoked his will, being possessed of several farms, including that of Knockans (which was real estate), and probate of his will was, on the 20th July, 1887, granted to the defendant Thomas Mac Gregor Greer and John Patterson.

Samuel Patterson, the testator's brother, died on the 29th March, 1898, having by his will, dated the 28th March, 1893, bequeathed his interest in the farm at Drumlee, with all his other property, to his brother John Patterson, whom he appointed his executor, and probate of his will was granted to John Patterson on the 25th May, 1898.

John Patterson died on the 29th June, 1898, having by his will, dated the 8th March of that year, appointed his wife Jane Patterson executrix, and probate was granted to her on the 29th August, 1898. By his will John Patterson provided as follows:—"I appoint to my dear wife Jane Patterson absolutely the lands of Knockans and the residuary personal estate of my late brother Alexander Patterson, or such portion or portions thereof as I can legally appoint to her; and I give, devise, and bequeath to my said wife all my property real and personal whatsoever and wheresoever, to be held by her absolutely. In the event of there being any portion of the residuary personal estate of my late brother Alexander Patterson which would not pass under the appointment or bequest hereinbefore contained, but which I am empowered to appoint among my blood relations, then and in such case I appoint the same as follows, that is to say, to the children who may survive of my late sister Jane Dunlop, one shilling each, to my sister Lily Dunlop one shilling, and to each of her children one shilling, and to my cousins Samuel Brown, William Brown, and Anne Brown of Carnaff, in the county of

Antrim, the residue of such residuary personal estate in equal shares."

Samuel Patterson died unmarried. John Patterson died leaving a wife surviving him, but without any child or grandchild.

Lily Dunlop was the sole surviving sister of Alexander Patterson. Another sister, Jane, had died in 1856, leaving seven children, two of whom had died leaving children. Alexander Patterson had no other brother besides Samuel and John, who were mentioned in his will. William Brown, Samuel Brown, and Anne Brown were first cousins of Alexander Patterson.

Lily Dunlop issued an originating summons, dated 11th October, 1898, for the determination of the following question :— Is not the plaintiff Lily Dunlop, on the true construction of the will, dated 17th March, 1887, of Alexander Patterson, and in the events that happened, entitled to one moiety of the residuary personal estate of the said Alexander Patterson, and for a declaration accordingly?

On the same date an originating summons was issued for hearing before the Vice-Chancellor by David Dunlop, as plaintiff, for the determination of the following question, viz. :—Is not the plaintiff David Dunlop, on the true construction of the will of Alexander Patterson, and in the events that have happened, absolutely entitled to the estate and interest of the deceased in the lands and hereditaments, late his property, in the townland of Knockans, in the county of Antrim?

The summons issued in the Vice-Chancellor's Court was transferred from his Court to that of the Master of the Rolls, and by permission of the Master of the Rolls was consolidated with the matter in his Court. The matter was adjourned into Court, and came on for hearing on the 28th November, 1898.

William Moore, for Lily Dunlop the plaintiff in the first summons, and for David Dunlop the plaintiff in the second summons :—

As to the farm of Knockans, under the terms of the will of Alexander Patterson, and in the events that have happened, David Dunlop takes the same absolutely.

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As to the residue—"blood relations" is equivalent to "relations." This expression has now the fixed meaning of statutory next-of-kin: *Pope* v. *Whitcombe* (1); *Lawler* v. *Henderson* (2); *In re Deakin* (3). The Browns, though relations in the ordinary sense, are not next-of-kin within the meaning of the Statute of Distributions, as Lily Dunlop, a sister of the deceased, and the children of a deceased sister are living to exclude them.

The period at which the next-of-kin are to be ascertained is the date of the death of John Patterson, the donee of the power: *Finch* v. *Hollingsworth* (4). *Pope* v. *Whitcombe* (1) on this point is wrongly reported.

A. F. Blood, for Samuel, William, and Anne Brown.

R. F. Harrison, for Jane Patterson, the widow of John Patterson:—

As to the farm of Knockans.—If the will had stopped before the words "and in the event of my two brothers," &c., there could be no doubt but that Mrs. Jane Patterson would have taken an absolute estate in a moiety. This can only be taken out of her if the second clause is so inconsistent with the preceding one that the first cannot stand. The two can be made quite reconcilable if we read in the words "then subject and without prejudice to the trusts hereinbefore declared"; or the will might be construed by giving a vested estate to David Dunlop, subject to a life estate in a moiety in Jane Patterson.

Though as to the residue the words of the will are not the same as in the case of the farm, the effect is the same. It is clear that the testator intended a widow of his brother to take some interest in her husband's share if there were no children. Why should not the ultimate gift be subject to this intention, and so work out by giving an absolute interest to the blood relations subject to the life estate.

We adopt the argument that the appointment to the Browns is bad. But the power of appointment is a mere power, and not a power in the nature of a trust; it consequently creates

(1) 3 Mer. 689.
(2) I. R. 10 Eq. 151.
(3) [1894] 3 Ch. at p. 575.
(4) 21 Beav. 112.

no equities in favour of the possible appointees. Therefore, there is an intestacy.

F. N. Greer, for the defendant, the executor of Alexander Patterson :—

Assuming that the appointment to the Browns is void, and that there is a trust for relations in default of appointment, although the class, which so takes, is confined to next-of-kin according to the Statute of Distributions, the members of this class take *per capita*, and not *per stirpes*; Sugden on Powers, 8th ed., p. 659; *Eagles* v. *Le Breton* (1); *Tiffin* v. *Longman* (2); *Wilson* v. *Duguid* (3).

W. Moore, in reply :—

A bequest to next-of-kin implies a distribution in the shares fixed by the statute. If "relations" means next-of-kin, the same rule should be followed. In *Tiffin* v. *Longman* (2) relatives did not mean next-of-kin, but only those of them who claimed within two months from testator's decease. *Eagles* v. *Le Breton* (1) was decided on the ground of there being a joint tenancy and no words of severance in the gift. Here the gift creates a tenancy in common. In *Reade* v. *Reade* (4), where there was a gift by implication in default of appointment, the terms used are the same. *Roach* v. *Hammond* (5) supports our contention, and has never been overruled.

THE MASTER OF THE ROLLS :—

Dec. 9

Two questions arise on the construction of this most puzzling will: one, as to the farm of Knockans, the other as to the testator's residuary estate. The material facts are as follows :—[His Lordship stated the facts as set out in the statement of the case.]

Now as to the farm of Knockans, which is real estate, the important facts are that the testator's brothers John and Samuel survived him: that Samuel died on the 29th March, 1898, without having been married, and that John died on the 29th June, 1898, leaving a widow Jane Patterson, but no child, or other descendant.

(1) L. R. 15 Eq. 148; 42 L. J. Ch. (N.S.) 362.
(2) 15 Beav. 275.
(3) 24 Ch. Div. 244.
(4) 5 Ves. 744.
(5) Gilbert's Eq. Rep. 92.

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Turning to the will, it is clear that in the first instance John and Samuel took life estates in moieties as tenants in common, with remainder as to each moiety to their respective wives and children, as they should respectively appoint, and to the wives and children of each equally as tenants in common in default of appointment. Pausing here, it is clear that the testator meant to provide for the wives of his brothers, just as for their children, and it is equally clear that he meant a surviving wife to be upon the same footing as a surviving child; that is, that if one of the brothers died first leaving a wife and no child, the wife would under this clause take his moiety, and the remainder in favour of the surviving brother would not take effect. But as Samuel left neither wife nor child, the gift over did take effect. This is the gift, "and in the event of any of my said brothers dying without leaving any issue or children him surviving, then it is my desire that the share of such deceased brother in the said hereditaments and premises shall, from and after his decease, be held in trust for my surviving brother for his life, and after his death for his children in such shares as he shall appoint, and in default of appointment for such children in equal shares." On this clause again there is no ambiguity. If nothing else followed, John would have taken (as he did), Samuel's moiety for life with remainder, not to his wife and children, but to his children, as he should appoint, and in default of appointment, equally as tenants in common. This limitation is different from that which applied to the original share, in so far as it does not include the wife: but there is no rule of law which it violates, nor is there any reason to strain the language of the will in order to force the two provisions into exact conformity. There is no inconsistency. The testator may have thought that providing for a sister-in-law out of one moiety of the Knockans lands was sufficient in any event. But then comes the clause which gives rise to the difficulty: "But in the event of my two brothers dying without leaving any issue, then the said hereditaments and premises shall, on the death of the survivor of them, be held in trust for my nephew David Dunlop, the son of Alexander Dunlop of Drumlee, absolutely." As both brothers died without leaving issue, David Dunlop now claims the whole.

There is no possibility of holding that in the events which have happened Mrs. Jane Patterson took a life interest in anything. The estate went over, if at all, on the death of the survivor, that is, of her husband John. She takes the entire freehold interest in the whole, or in one moiety, or else she takes nothing at all. It is the duty of a Court of construction to ascertain, if it be possible, what the testator really meant from the language he has used. That does not mean that the exact words he has used are in all cases to be followed in their literal meaning, even if it be plain that to do so would frustrate the real intention. If, having considered the will and the whole will, it is plain that to place a literal meaning upon one clause would defeat the clear intent, it may be necessary to "do violence" (as an eminent Judge once expressed it), to the language used. The thing to be ascertained is what was the man's *will*.

Mr. Hawkins' fourth proposition in his treatise on the construction of wills is as follows:—"Notwithstanding the last two propositions—the intention of the testator, which can be collected with reasonable certainty from the entire will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against, the literal sense of particular words and expressions. The intention, when legitimately proved, is competent not only to *fix* the sense of *ambiguous* words, but to *control* the sense even of *clear* words, and to *supply* the place of *express* words, in cases of difficulty or ambiguity."

In *Grey* v. *Pearson* (1), Lord St. Leonards says:—"Upon the whole will the paramount intention is regarded, and directions contrary to that view are, in effect, struck out of the will. So when a testator's intention is clear, but he fails in words to provide for the precise event which happens, the Courts supply the words."

In *Towns* v. *Wentworth* (2), Lord Kingsdown said:—"When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law

(1) 6 H. L. C. 61. (2) 11 Moo. P. C. C. 526.

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will not permit to take effect, such expressions must be discarded or modified; and on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared."

In *Greenwood* v. *Greenwood* (1) the Court wrote into a will words which gave a life estate to the testator's widow, holding on the context that it was necessary to do so in order to effectuate the intention. *Daniel's Settlement* (2) and *Re Redfern* (3) are similar cases; and in *Abbott* v. *Middleton* (4) the House of Lords supplied after the words, "in case of my son dying before his mother" the words "without children." As the son left a child this altered the whole destination of the property.

Obviously, however, great care must be taken in applying this doctrine. It must, as I have elsewhere said, be clear, not alone that words have been omitted, but also what the substance of the omitted clause is, otherwise the Court would be not construing but making a will.

Now, bearing these principles in mind, it is necessary in each case first to consider the document itself in order to see if all its provisions can be reconciled. If they can, *cadit quæstio*, even though the Court may be unable to discover the reason for a particular disposition. Can the clauses before me reasonably stand together?

There are cases in which clauses are so contradictory that one is driven to reject one or the other. In that case the general rule is that the latter shall prevail, on the theory that it is the ultimate and most mature expression of the testator's mind. This has been called by Sir George Jessel a rule of thumb, and before applying it every effort should be made to reconcile apparently inconsistent expressions.

I have pointed out that in the present case, as regards the original moieties at least, the wives of the brothers are placed by

(1) 5 Ch. Div. 954.
(2) 1 Ch. Div. 375.
(2) 6 Ch. Div. 133.
(4) 7 H. L. C. 68.

the testator on exactly the same footing as their children. Indeed there is a circumstance (I do not know whether it was mentioned in the argument or not—I rather think not) which gives some emphasis to this view, and if needed might tend to oust the "rule of thumb." It appears from the attestation clause (though the certified copy of the probate does not notice it in the body of the will) that the words "wives and" before children were interlined prior to execution. This seems to me important, as showing what was in testator's mind as regards the original shares. It is also important as tending to show that the omission of these words when dealing with the accrued share was not accidental, though that may be more a matter of speculation.

Did this testator intend by the final clause to deprive the wife of his brother of all the benefit previously conferred upon her in so express, and indeed, emphatic, a manner?

It is my clear impression that he did not.

If Samuel had had a child John's widow would have had an interest in one moiety, whether John died before Samuel or not. Of course, too, she would have been provided for if she had had a child herself. I am quite certain that the testator did not mean her to lose all the benefit previously conferred upon her in clear terms, merely because both brothers died childless. If Samuel had left a widow but no child, and if John had survived him (as he did) and died childless, Samuel's widow would have taken his moiety, whether under an appointment or as unappointed. But if the gift over on the death of John took effect (both brothers having died childless) her vested interest would then be divested on the literal construction of the clause, though she might have been in possession and enjoyment for years. I cannot think this was intended. To hold that it was involves an unintelligible contradiction.

I was for a time disposed to think that the will might be reconciled by supposing that testator had inadvertently omitted the words "wife or" before the word children when it occurs without them. But I have given some reason for holding that this omission was not in fact accidental, and it would be going a great length to do it, when there is so marked a distinction between the mode of dealing with the original and accrued shares, a distinction

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which is not connected with the gift over. Mr. Harrison suggested that the words "subject as aforesaid" would meet the case. I think that these words would be adequate, their meaning, if expanded, being, "subject to the provision already made for the wife of my brother."

This is, no doubt, an interpolation; but it effectuates, and, I think, is necessary in order to effectuate, the intention. In the result, I think that Jane Patterson is entitled absolutely to the one moiety originally enjoyed by her husband, and that David Dunlop is absolutely entitled to the other moiety which was originally Samuel's. It makes no difference whether Jane Patterson takes under her husband's appointment to her, or in default of appointment, though the former is the legal view.

The next question is as to the residuary estate. The testator declares that his trustees "shall stand possessed thereof upon trust to pay the interest or annual income to arise therefrom to my said brothers, Samuel Patterson and John Patterson, during their joint lives, in equal shares, and from and after the decease of either of them to pay one moiety of my residuary personal estate to his wife and children in equal shares, and in the event of his dying without leaving a wife or children him surviving, then upon trust to pay the entire of the interest or annual proceeds thereof to my surviving brother during his life, and from and after his decease then upon trust as to my entire residuary estate, to pay the same to and amongst his children in such shares as he shall appoint, and in default of appointment to such children equally. In case, however, the said Samuel Patterson and John Patterson shall not have any child or children, then I empower the survivor of them by deed or will to appoint the said personal estate to and amongst my blood relations in such shares and subject to such limitations as he may think fit."

By his will John Patterson purported to exercise his power of appointment over the residue, which he erroneously says he had power to appoint, amongst *his* blood relations (though no doubt any blood relation of his would be a blood relation also of his brother) by allocating nominal sums to the children who should survive him of his late sister Jane Dunlop, to his sister Lily Dunlop and to her children, and the rest of the residue, the whole but

a few shillings, to his cousins Samuel, William, and Anne Brown in equal shares. This is clearly a bad appointment; because though the Browns are akin to the testator, and in that sense blood relations, they are not next-of-kin, and the power was one of distribution merely, not selection. Mr. Farwell says (p 504):—"A power of appointment among the 'relations' or the 'family' of the testator or of A, can be well exercised by an appointment to any relations, although not within the degree of next-of-kin, if the power authorizes selection: *Grant* v. *Lynam* (1), *Harding* v. *Glyn* (2). But if the power authorizes distribution merely, and not selection, the donee is confined to the next-of-kin according to the statute: *Pope* v. *Whitcombe* (3)."

There is no express gift in default of appointment: but I think that such a gift is to be implied in favour of the class which would have taken under an exercise of the power. No doubt the word "empower" would not of itself necessarily create a trust; but as this is a residue, and as there is no reason to suppose that testator meant to die intestate as to it, and as there is no other direction in the will which would embrace the residue, I think the testator must be taken to have intended by this clause to dispose of it, that is, that the interest must pass in default of appointment, the power being thus in the nature of a trust. I considered some of the cases on this subject in *Moore* v. *Ffolliot* (4), and do not mean now to do more than say that I think there is a trust for the "blood relations" in default of appointment. Then, who are the blood relations, and what interests do they take?

"Blood relations" cannot embrace a larger class than "relations." No doubt all men are blood relations of all other men, if they are descended from a common ancestor, however remote; and we are told that the nations of the earth are made of "one blood." But for manifest convenience the word relations in legal import is limited to nearest of kin and now to next-of-kin under the statute. Lord Justice (then Mr. Justice) Chitty said in *Wilson* v. *Duguid* (5), at p. 251:—"The cases on 'relations' are very

(1) 4 Russ. 292.
(2) 2 W. & T. L. C. 335.
(3) 3 Mer. 689.
(4) 19 L. R. Ir. 499.
(5) 24 Ch. Div. 244.

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peculiar. It is now established that where there is a power to appoint among relations so as to give the donee of the power the right of selection, the donee of the power can appoint to any relations, but in modelling the trusts to be applied in default or arising from the power being coupled with the duty, the Court has found itself under the necessity of confining the class of relations to a particular set of relations, and has adopted the rule that relations who take in default of the exercise of the power in that case are those who are next-of-kin according to the statute; they take as tenants in common, but not in the shares defined by the statute," and this is the rule of law on the subject. But are the next-of-kin to be ascertained as of the date of the death of the testator or at the death of the tenant for life? Here, the tenant for life had express power to appoint by deed or will. If he appointed by will, the appointment would of necessity be limited to persons living at his death. *Harding* v. *Glyn* (1) and *Brown* v. *Higgs* (2) seem to show that the class is to be limited to persons living at the death of the tenant for life.

Then, in what shares and proportions do they take? I think it clear that in a case like the present where the trust arises by implication from a power to distribute, that as the objects of the power could only take in severalty if it were exercised, they take also in severalty, and not as joint tenants, under the implied trust in default of appointment. They take, too, *per capita*, and not *per stirpes*. In cases where the Statute of Distributions is referred to expressly or by implication the objects take in the shares which it would define. But where, as here, there is no reference general or specific to the statute at all, but where for convenience the law adopts what I may call the statutory table of consanguinity in order to prevent the gift from failing for uncertainty, the objects of the power or *cestuis que trustent* take, in default of appointment, *per capita*: *Tiffin* v. *Longman* (3); *Eagles* v. *Le Breton* (4). In the latter case they took as joint tenants, there being no words of severance nor any power of appointment in shares as here. In the

(1) 1 Atk. 469.
(2) 8 Ves. 561.
(3) 15 Beav. 275.
(4) L. R. 15 Eq. 148; 42 L. J. Ch. (N.S.) 362.

former, the question of joint tenancy or tenancy in common could not have arisen, the language of the gift plainly creating a tenancy in common.

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Solicitors for Lily and David Dunlop: *Stott & Co.*
Solicitors for the Browns: *White & White.*
Solicitors for the defendants: *Greer & Hamilton.*
Solicitors for Jane Patterson: *White & White.*

R. W. L.

IN THE MATTER OF THE ONE UNDIVIDED MOIETY IN THE LANDS DESCENDED TO GRACE LIZZIE GLOVER FROM ELIZA BREWSTER, DECEASED, AND IN THE MATTER OF THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

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March 27.
April 19.

(1899. No. 244.)

Infant—Management of land during minority—Appointment of trustees—Conveyancing Act, 1881, *sect.* 42—*Infant taking by descent.*

The provisions of sect. 42 of the Conveyancing Act, 1881, enabling the Court to appoint trustees on the application of the next friend of an infant, who is beneficially entitled to the possession of any land, include the case of an infant taking by descent.

SUMMONS.

This was an application on the part of Grace Lizzie Glover, an infant, by William Grove White, her next friend, for an order that Edward Glover and Robert Powell be appointed trustees for all the purposes of section 42 of the Conveyancing Act, 1881, of the one undivided moiety of the lands descended to the said Grace Lizzie Glover from Eliza Brewster, deceased.

The material facts were stated in the affidavit of Edward Glover, the father of the applicant, as follows:—Eliza Brewster, widow, late of Castlebar, died on the 17th February, 1898, intestate. She was at her death seised in fee of real estate, and possessed of

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chattels real and of other personal estate. Eliza Brewster left her surviving one daughter, Anne Grace Brewster, who was unmarried, and of age, and one grand-daughter, the applicant Grace Lizzie Glover, born on the 5th September, 1881, and unmarried. She was the only child of the marriage of the said Edward Glover with Sarah Maria Brewster (daughter of the said Eliza Brewster), who died the 29th September, 1881. The said Anne Grace Brewster and Grace Lizzie Glover were the co-heiresses at law and only next-of-kin of the said Eliza Brewster. Administration of the personal estate of the said Eliza Brewster was granted on the 23rd April, 1898, to Anne Grace Brewster.

The real estate of the said Eliza Brewster consisted of lands in the county Mayo of considerable value, held partly in fee-simple and partly in fee-farm. Some of the lands were let to tenants, and others in the occupation of the said Eliza Brewster. She also had chattel real property producing a profit rent of about £50 a-year. The said Anne Grace Brewster was residing in the family residence of the deceased at the time of her death, and was desirous of continuing to do so; but it was impossible to arrange the rent to be paid by her for the share of the said Grace Lizzie Glover, as there was no person having authority to make a letting. Great difficulties had arisen as to the management of the said lands, in the absence of some persons to act as trustees for the said Grace Lizzie Glover. Proceedings were instituted to administer the personal estate (other than the said chattels real) of the said Eliza Brewster, but an administration of her real estate and chattels real was not desirable, nor was it desired to make the said Grace Lizzie Glover a ward of Court.

W. P. Ball, in support of the summons:—

The appointment of trustees to manage the infant's undivided share of the lands is eminently desirable, if the Court has jurisdiction under the section to appoint them. It is submitted that the language of the section is wide enough to include the case of an infant who takes, not under a settlement, but by descent. There is no reported case on the subject, and the opinion of conveyancers differs: Wolstenholme, Brinton and Cherry's Convey-

ancing Acts, p. 94; Hood and Challis' Conveyancing and Settled Land Acts, p. 109. I rely on the words of sub-section (5), "The settlement, if any," as showing that the section includes a case where there is no settlement.

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J. S. Bernard, for Anne Grace Brewster, supported the application.

THE MASTER OF THE ROLLS:— April 19.

The point in the case is a short one, and quite new. It turns upon the 42nd section of the Conveyancing and Law of Property Act, 1881; and the question to be decided is whether that section applies to the case of lands belonging beneficially to an infant which have been acquired by descent, and not under a settlement. The opinions of text writers appear to differ upon the point, and there is no decision, nor any expression of judicial opinion bearing upon it.

The 41st section, of course, applies to lands descended; but its scope and object are to attract to the estates of infants the powers of the Settled Estates Act of 1877. The estate of the infant becomes a settled estate—that is, it shall be deemed to be the "subject of a settlement"; and a settlement signifies "any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments," under which the lands stand limited to or for any persons by way of succession (40 & 41 Vict. c. 18, s. 2). That is, lands held in fee-simple are to be deemed to stand limited for persons by way of succession; and lands descended to an heir are to be deemed to be held under an instrument in writing. This, however absurd as matter of drafting, is clear enough in meaning; and the object was no doubt, as I have said, to enable the Courts to sanction leases and sales of lands held by persons who are under the disability of infancy.

But the 42nd section is the one on which the question depends; and its first clause is the important one. If it embraces the case of lands not the subject of any "settlement," then it applies to the present case. Sub-sect. 1 runs as follows:—"If and as long as any person who would but for this section be beneficially entitled to the

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possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply."

At first sight it seems clear that this was meant only to apply when there was a settlement. "The trustees appointed for this purpose by the settlement—*if any*—or if there are none, then the persons, if any, who are for the time being *under the settlement* trustees with power of sale of the settled land . . . or *if there are none*, then any persons appointed by the Court," &c. The draftsman seems to have provided for the case of there being trustees of the settlement for the purposes of sect. 42, and of there being no such trustees of the settlement. In other words, "if any" when they first occur would, *prima facie*, seem to refer to the antecedent trustees. But Mr. Ball argued that they may refer to the immediate antecedent (viz. the settlement), and that thus the portion of the section would read as if instead of "if any" the words were "if there be any settlement." If this were so, no doubt an intention would appear to provide for all cases, both for a settlement and for no settlement. Great force is lent to this suggestion by the words of sub-sect. (5):—"The trustees shall lay out . . . residue of income . . . in investment on securities on which they are by the settlement, *if any*, or by law authorised to invest trust money." It is difficult to read these words grammatically without connecting the words "if any" with the immediate antecedent, "the settlement." But they might apply to the securities; and the reference may have been to securities (if any) authorised by the settlement—and if none—then to such as are within the general powers of trustees. Clause (iii) of sub-sect. 5 is, however, unambiguous. It expressly, and in terms, includes the case of lands descended. "If the infant dies while an infant, and being

a woman without having been married, then, when the infant was, under a settlement, tenant for life, or by purchase tenant in tail, or tail male, or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the lands from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee-simple, absolute or determinable, then in trust for the infant's personal representatives." Sub-sect. 1 says:—"In every such case the subsequent provisions of this section shall apply"; that is, the provisions applicable to lands descended as well as those applicable to lands in settlement. If that be so, lands descended must be within the scope of this section, as a whole. There is much confusion in the language used. It is not easy to read all these enactments consistently: but there are other clauses which might throw light on the point. I mean sub-sections (7) and (8).

"(7) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"(8) This section applies only where that instrument comes into operation after the commencement of this Act."

In the case of lands descended there is no "instrument" under which the interest of the infant arises. Of course, it may be said that in that case there is no contrary intention expressed by any instrument. But the clause would appear to presuppose an instrument; and clause (8) limits the operation of the section, as a whole, to cases where the instrument comes into operation after the 31st December, 1881. It applies in terms only to cases where the instrument so comes into operation. It is not easy to read this as applicable to cases such as that before me, unless the words "if any" are carried on, and supplied in each case by virtue of the context.

On the whole, though the question is not free from doubt, I am of opinion that the statute in this portion of it dealing with and headed "Infants" indicates a general policy, which is to be carried out in proper cases by the application of section 42. Some of the provisions of the latter section are in terms applicable to

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lands inherited and not settled. I feel bound to give effect to this general policy, and apply sect. 42, when expedient, in all cases of lands of infants, whether settled or not.

I should be very glad if there were any way of obtaining the decision of the Court of Appeal on this important point: but in the present case I cannot see how that is to be done. I feel bound, however, to give my decision on the question; and being of opinion that if the jurisdiction exists—as I believe it does—this is a proper case for its exercise, I shall make the order sought.

Solicitors: *A. O'Conor & Son.*

W. L.

V.-C. 1899. May 16.

M'CANN *v.* THE NEWRY TOWN COMMISSIONERS.

(1897. No. 831.)

Taxation—Party and party costs—Settlement of statement of claim by senior counsel—Disallowance by Taxing Master—Practice.

In an action for an injunction to compel the defendants to remove a certain wooden hoarding erected by them opposite the adjoining premises of the plaintiff in a public street, and which prevented him from having full access thereto, the plaintiff obtained judgment with costs. On taxation, the Taxing Master disallowed the plaintiff, as party and party costs, the costs of the settlement of the statement of claim by senior counsel, and stated in his report his reason for so doing as follows:—"Party and party costs. Senior counsel not allowable, having allowed £2 2*s.* to junior counsel for settlement of claim":—

Held, that the costs should be allowed.

MOTION to review taxation.

In this action the plaintiff was the lessee under an indenture dated the 22nd February, 1897, of a certain plot of ground in the town of Newry, which had at one time abutted on a certain stream of water. The plaintiff's lessor and his predecessors in title had claimed the right of access to this stream as riparian owners. In the year 1888 the defendants, without obtaining any

authority from the plaintiff's lessor, bridged over this stream, and converted it into a public street, and along the part where the above-mentioned plot of ground adjoined the street, they erected a wall, portion of which was on the lands in question, so that the plaintiff's lessor was prevented from having free access to the aforesaid public street. The plaintiff's lessor accordingly broke down a portion of this wall, and an action was brought against him by the defendants, which was tried at the Summer Asssizes of 1896, and resulted in a verdict and judgment for the plaintiff's lessor. In the year 1897 the defendants erected upon the aforesaid street a large hoarding of wood which prevented the plaintiff, who was then in occupation of the lands under the above-mentioned lease of the 22nd February, 1897, from having access to the street. The present action was then brought by the plaintiff, in which he claimed an injunction to compel the defendants to remove this wooden structure: and at the trial he obtained judgment in his favour with costs.

The Taxing Master on taxation of costs disallowed the plaintiff, as party and party costs, the costs of the settlement of the statement of claim by senior counsel. The items were: £3 3*s.* to senior counsel for settling the statement of claim, and 6*s.* 8*d.* to the solicitor for attendance. In his report the Taxing Master gave the following reason for disallowing these costs, viz:— "Party and party costs. Senior counsel not allowable, having allowed £2 2*s.* to junior counsel for settlement of claim."

The plaintiff now applied to the Court for an order that the Taxing Master be directed to review his taxation by allowing these costs.

Williamson, for the plaintiff, in support of the motion:—

The Taxing Master has apparently disallowed the costs of the settlement of the statement of claim by senior counsel, as a matter of general principle. There is no such principle in any rule of Court or reported case. The action was an important one; and both the statement of claim and the defence were signed by senior counsel.

There was no appearance for the defendants.

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THE VICE-CHANCELLOR made an order directing the Taxing Master to review his taxation by allowing the above-mentioned costs.

Solicitors for the plaintiff: *Small & Co.*

J. MAC M.

Appeal. 1899.

Jan. 30, 31. Feb. 1, 2, 23.

HUTCHINSON *v.* TOTTENHAM (1).

Power—Execution—Referential construction—Hotchpot clause.

APPEAL by Sophia Dorothy H. Hutchinson from the judgment of the Vice-Chancellor reported [1898] 1 I. R. 403.

Twigg, Q.C., Samuels, Q.C., and *Brady,* for the appellant.

O'Connor, Q.C., and *G. Fitz Gibbon,* for Cecil H. Hutchinson and Eleanor H. Hutchinson.

Feb. 23.

THE COURT OF APPEAL affirmed the decision of the Vice-Chancellor.

Solicitors for all parties: *T. T. Mecredy & Sons.*

R. D. M.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, and HOLMES, L.JJ.

DEWAR AND OTHERS *v.* THE CITY AND SUBURBAN RACECOURSE COMPANY.

V.-C. 1899.

Feb. 24, 25. March 1, 2, 27.

(1898. No. 1289.)

Residential locality—Racecourse—Sunday racing—Disturbance of adjoining inhabitants — Interruption of Divine service — Obstruction of public thoroughfares—Nuisance—Injunction.

Injunction granted to restrain horse races from being held on Sunday on a racecourse adjoining a residential locality, it being shown to the satisfaction of the Court that the quiet and comfortable enjoyment of their houses by the inhabitants in the neighbourhood was interfered with, and the services in churches in the locality interrupted, by the shouting and cheering of the crowds collected on the course and the cries of the bookmakers, and also that the public thoroughfares leading to the racecourse were obstructed by vehicles conveying persons to and from the races, and by vehicles drawn up near the racecourse waiting for fares.

THE plaintiffs in this action resided at, or near, a place called Jones'-road, situated towards the north-eastern boundary of the city of Dublin, and forming with the streets and avenues surrounding it a residential district covered by private houses.

The defendant Company were the proprietors of a plot of ground known as part of the lands of Clonliffe, about 8 acres in extent, abutting on and adjoining Jones'-road. The Company was incorporated under articles of association on the 3rd May, 1894, Mr. Maurice Butterly being the principal shareholder and managing director, for the purpose of carrying on the business of racecourse owners on this plot of ground.

The plaintiffs complained that the races, which were chiefly held on Sunday, were conducted in a disorderly manner, and were frequented by large crowds of people drawn from Dublin and its suburbs, and that betting was extensively carried on at them, and that they were also the resort of persons of bad character. They also complained that the cries and cheers of the spectators, and the

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shouting of the book makers frequenting the races were distinctly heard in their dwelling-houses, and caused great annoyance and inconvenience to the inmates. They also alleged that the assembling and dispersal of the crowds were attended by scenes of great confusion and uproar, and that they and their families were subjected to insulting remarks from the occupants of the course, and the persons going to and returning from it, that their garden walls were broken and damaged by persons climbing upon them to obtain a view of the races, and that broken bottles and other refuse were thrown into them, that the vehicles conveying persons to and from the races, or waiting outside the course for fares, caused serious obstruction to the roads leading thereto, and were also an element of considerable danger to pedestrians. The clergymen of two churches in the neighbourhood also complained of the interruption to Divine Service, from the noise of the shouting on the course.

The defendants denied that the races were conducted in a disorderly manner or frequented by persons of bad character, or that they were held during the hours of Divine Service. They produced at the trial, among other witnesses, some of the inhabitants of the neighbourhood, who stated that they suffered no inconvenience or annoyance from the races.

The plaintiffs' claim was for an injunction to restrain the defendants from continuing to hold horse races on Sunday, on the aforesaid plot of ground.

Certain portions of the evidence given at the trial were read by the Vice-Chancellor in giving judgment, and are here given *in extenso*.

The following is portion of the evidence of the Rev. B. E. Gentleman, one of the plaintiffs:—

"Describe to his Lordship in your own words, the inconvenience you suffered consequent on this racing on Sunday.—Well, my Lord, speaking in the first place, as a resident on the side of the road, where the races are held, it is a very great annoyance to me and my family. It would be an annoyance any day of the week, and it is a ten-fold annoyance on Sunday, the quiet day on which we want to rest; and as a minister, I need of course to give some attention to my studies and preparation for the services I hold

and the sermons I preach. My study is on the side where this racecourse is, and the shouting and cheering crowd, and the noise created by the betting men, which I can hear quite distinctly, make it a regular pandemonium while the races are going on.

"Do they attract very large crowds to these grounds?—Yes, very large crowds.

"What character of people frequent them?—I can only judge from seeing the people passing on cars, and going in. From my windows I cannot look upon the whole crowd as they are in the course, but I venture to say they are composed of several classes, and I am greatly afraid a large number of young men in shops, apprentices, drapers' assistants, and grocers' assistants, frequent the place, and in my judgment a very dangerous place for such young men to go to, and tradesmen of the younger age, young tradesmen, mechanics and people of that class: and then there is a lower strata of society go there too. The wall at the foot of my garden is very frequently mounted by a number of the fellows who don't want to pay, and of course they are of a lower order than those I have referred to. I have seen as many as six or eight or ten astride my wall, which they tear in their efforts to get up. It is a concrete wall, and the foot marks are still to be seen on that wall, breaking it down.

"Have you suffered from this nuisance of missile and bottle throwing?—No, I do not; for the lane lies between me and the course, and I have no trouble of that kind. As to our garden, we have laid out part in grass and flowers and shrubs, and in the very hot summer afternoon it is a very desirable thing to spend an hour or two there, but this is rendered absolutely impossible. I have a family of six, and it would be most desirable to make use of the garden to sit and enjoy the quiet and cool of the breeze from the Clontarf neighbourhood.

"Have you been able to do so while these races are on?—No; it is impossible. I would not have my sons demoralized by such shouts and cries as we hear coming across the wall.

"Do these penetrate into your house?—Yes, certainly, and even with closed windows and doors. I may add that I have heard these shouts as far as Fairview, which lies between Dublin and Clontarf. In coming up from Clontarf one Sunday, while the

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races were going on, I distinctly heard the shouting as I came up from Fairview."

The Rev. E. Travers Crozier, the curate in charge of the Chapel-of-Ease on the Clonliffe-road, was also examined for the plaintiffs, and the following portion of his direct evidence was referred to by his Lordship :—

"You are familiar, I suppose, with the Sunday horse race meetings?—Yes, I hear them frequently.

"Do you object to the noise?—During service in our church frequently the service has been greatly annoyed, though the distance is three hundred yards, by the shouting and noise from the racecourse, especially during the service of Holy Communion. Even during the most solemn part of the service a great shout will come and drown my voice, so that the people cannot hear my words of consecration in the celebration of the Holy Communion."

The following portion of the evidence of the same witness, given on cross-examination, was also referred to :—

"At what hour is your service?—We have service at 8, Sunday school at 10, and morning service from half-past 11 till 1, sometimes till half-past 1 (if there is Communion service), a children's service at half-past 3, and evening service at 7.

"When would the service at half-past 11 be over?—About 1 or up to half-past 1.

"I presume Holy Communion is administered at the service at 8 and half-past 11?—Yes.

"Of course the Holy Communion is at the end of the service, which begins at half-past 11.—Yes, at the end.

"And it would be all over about half-past 1?—Yes, about that."

The following portion of the evidence of Mr. Maurice Butterly, the managing director of the Company, given on cross-examination, was also referred to by the Vice-Chancellor :—

"Take that paper in your hand (the *Daily Independent* of Friday, November 26th, 1897) :—You see where it is marked : that is an advertisement of your races?—It may be; I don't know; I did not put it in.

"Look at it and read it.—I see it there.

"Don't you know that that was an advertisement of your races?—If it is there it must be.

"You used to advertise in the *Daily Independent*?—In all the papers, and that was for the month of November.

"'Where to see a good day's sport, Sunday next, City and Suburban Races, Jones'-road, first race 1.30 sharp. Admission one shilling. Grand Stand 3*s*.' You see the list of starters given in that paper?—The list of horses, yes.

"This is a list of the horses and a programme of the races:—'City and Suburban Races, Sunday next, 28th November, 1.15, the Clontarf Plate, £15.' Your Lordship will see the bearing of that in a moment when I read the following day's paper, the paper of Saturday, the day before the races. That is another of your advertisements there marked?—Yes; if it is there it must be all right.

"This is Saturday's paper:—'Where to see a good day's sport. To-morrow (Sunday), City and Suburban Races, Jones'-road. First race 1.15 sharp. The card comprises five events, and the first race, in order to make certain of good light for the concluding items takes place at 1.15, and not at 1.30, as previously advertised.'—Yes, these are the advertisements of the events you speak of; but I don't admit that the races took place till 2 o'clock for all that."

The Right Hon. The Mac Dermot, Q.C., *Sullivan, Q.C.*, and *J. Fitzgerald Murphy*, for the plaintiffs.

[They cited *The King* v. *Moore* (1); *Walker* v. *Brewster* (2); *Inchbald* v. *Robinson* (3); *Kidd* v. *Carlile* (4); *Barber* v. *Penley* (5).]

Ronan, Q.C., *O'Connor, Q.C.*, and *W. Q. Murphy*, for the defendants.

March 27.

THE VICE-CHANCELLOR:—

This action has been brought for an injunction to restrain the defendants from the continuance or repetition of a nuisance caused by the establishment of a racecourse, and the holding thereon of horse races, especially on Sundays, amounting to a

(1) 3 B. & Ad. 184.
(2) L. R. 5 Eq. 25.
(3) L. R. 4 Ch. App. 388.
(4) 6 C. & P. 636.
(5) [1893] 2 Ch. 447.

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serious disturbance of, and interference with, the ordinary enjoyment of their dwelling-houses by the inhabitants in the vicinity of the ground in which these races are held; and also interrupting the performance of Divine Service in the churches in the neighbourhood, which are attended by persons living therein. The defendants deny the causing of any nuisance or disturbance to the plaintiffs, or any interruption to the services in the churches. They also allege that these races are conducted in a quiet and orderly manner, and are not objected to by a large number of the inhabitants of houses in the neighbourhood; and that the races were established, and the racecourse and its buildings were constructed at a large expense, and with the knowledge of the plaintiffs and other persons, alleged to have been disturbed, without making any objection or complaint; and they rely on this as a standing-by or acquiescence, which now disentitles the plaintiffs to relief. They also put forward, as a defence, that this action is not brought *bona fide*, nor by the plaintiffs named therein, but by persons outside and uninterested in this alleged nuisance, and who have sued in the names of the plaintiffs in order to forward their own peculiar religious views as to the strict observance of Sunday.

The only substantial question is whether the acts complained of really constitute such an interference with the ordinary comfort and enjoyment of the homes of the plaintiffs, that they are entitled to come to this Court, and ask it to interfere for their protection. Another portion of this question is, whether there has been any interference with the religious services which they attend, and which they, as all subjects of the realm, are entitled to the undisturbed enjoyment of.

The principles on which the Courts act and the general application of the principles are well settled. They are clearly enunciated by the eminent Judges who decided the case of *The King* v. *Moore* (1), a case which has ever since been followed, where it was laid down that a man cannot be allowed to make a profit to the annoyance of his neighbours; that if a person collects together a crowd of people to the annoyance of his

(1) 3 B. & Ad. 184.

neighbours, that is a nuisance for which he is answerable; that it need not be proved that it is his object to create a nuisance, or that it must be the necessary and inevitable result of his act, but if it be the *probable* consequence of his act, he is answerable as if it were his actual object; and that if the experience of mankind must lead anyone to expect the result, he will be answerable for it. Taunton, J., referred to a passage in Hawkins's P. C. that "all common stages for rope-dancers, and all common gaming-houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons which cannot but be very inconvenient to the neighbourhood. Also it hath been holden that a common playhouse may be a nuisance if it draw together such numbers of coaches or people, etc., as prove generally inconvenient to the places adjacent."

That case was referred to by Sir W. P. Wood in *Walker* v. *Brewster* (1), in reference to a nuisance by collecting crowds, as standing on grounds which are unimpeachable; and he held that the collecting of crowds alone is sufficient to establish a nuisance which the Court will restrain. The case of *Inchbald* v. *Robinson* (2) establishes another important principle, namely, that the noise of a performance complained of, which was proved to be heard inside the neighbouring houses to such a degree as materially to interfere with the comfort of the inhabitants, according to ordinary habits of life, established a case of nuisance calling for the interference of the Court. These cases sufficiently illustrate the rule of our law, that an owner of land cannot establish thereon anything which will lead to the disturbance or annoyance of his neighbours: "*Sic utere tuo ut alienum non lædas.*" Of course in applying this rule the Court must use common sense, and it should not be applied to trifling cases which would not cause annoyance to persons of ordinary reason.

It is important here to consider the nature and situation of this locality. Though nearly adjoining the thickly inhabited portions of the city, it was till recent years not closely built on, and it retained somewhat of the nature of a country district.

(1) L. R. 5 Eq. 25. (2 L. R. 4 Ch. App. 388.

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The very field converted into the racecourse was, until the year 1894, a market garden containing 10 or 12 acres. The houses were few and scattered; but since then it has been closely built on, and consists almost entirely of dwelling-houses erected in streets or terraces, which became a favourite locality for persons in employments in the city during the day, and who enjoyed the quiet and better air of the place in their hours at home. It was essentially a residentiary district for the middle classes. To such persons a quiet Sunday was a matter of great importance, whether their religious views were strictly sabbatarian or not. There was a Chapel-of-Ease to St. George's parish near to the place where the racecourse was established, and a Methodist church or chapel quite close to the racecourse. The race-field was in the midst of all these buildings. It belonged to the defendant Butterly, who had acquired a good deal of building ground in the neighbourhood. This district is now continuously built on, or nearly so; and in fact forms part of the city, and is all thickly inhabited. It is a most unsuitable place for setting up a course for horse-racing; and from its situation it would be impossible to prevent its creating disturbances to the quietness and comfort of the inhabitants of the houses adjoining it, no matter how carefully it was managed. The very object of it was to attract large crowds to the place; and it was proved that the defendant Butterly, who was the promoter and principal manager of it and the proprietor of the land, had expended £5000 or £6000 on making it into a racecourse with the necessary or usual accommodation for spectators, betting-men, book-makers, and other persons attending such sports. This was, of course, done for the purpose of making profit, and that could only be made by attracting large crowds, and giving them free scope for their enjoyment, a considerable portion of which would naturally lead to noisy shouting and cheering. But it is not only within the enclosure that this would take place; for the crowds, some on foot and some in vehicles of various kinds, who would be seen to hurry to its entrances, would be productive of further noise and disturbance. Again, there would be numbers of the lowest classes who could not pay for admittance, and who would congregate outside, and their presence would not be likely to add to the comfort or quietness of the

neighbouring householders and their families. The vehicles, waiting for fares, would, of course, be drawn up along the roads or streets approaching the racecourse, and add another material element of noise and obstruction. It seems to me that without any proof of this state of things having actually existed, it might have been anticipated that it would exist from the establishment of such an entertainment in such a locality. I lay much stress on this in consequence of the contradictory nature of the evidence on the subject.

In approaching this part of the case it seems to me that a great deal of these alleged contradictions are more apparent than real; for, while on the side of the plaintiffs, witnesses are swearing to facts within their own knowledge, as to which their evidence must be either true or wilfully false, on the side of the defendants the witnesses in great part only swear to matters of opinion. No doubt there are actual contradictions which cannot be reconciled, but these are few in comparison to the expressions of opinion. Some of the plaintiffs, who are residents in the close vicinity of the racecourse, all describe as matters of actual occurrence the great and many inconveniences they have sustained by the holding of these races. They all appeared to me to be truthful, and though in some instances using strong language in their descriptions of their discomforts, I see no ground for distrusting their statements of facts. They stated the many different inconveniences suffered by them from the races, the noise of shouting, cries of bookmakers, trespasses to their gardens and walls by person scrambling for places of view, obstruction to the roads and streets by cars and carriages drawn up waiting for fares, crowds outside the racecourse as well as inside it, persons staring in at their back windows looking upon the racecourse, rude remarks by persons inside and outside the course, tables for roulette and other gambling, throwing of empty bottles into their gardens, and other matters not necessary to mention in detail. One of the plaintiffs' witnesses, not himself a plaintiff, described the state of things on Sunday afternoons very graphically. He stated that he is a postman and on duty very early on Sunday mornings, and that he comes home in the afternoon to take a sleep, but cannot get a sleep in consequence of the noise and uproar at the back of his

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house which looks out on the racecourse buildings, especially at the small Pavilion, that "the noise was terrible—the rows they kick up."

An important witness, one of the plaintiffs, the Rev. B. E. Gentleman, was examined. He is the minister of the Methodist church or chapel, which is very near the racecourse, and lives in a house immediately opposite his church, occupied as the residence of the minister for the time being. He stated the hours at which his services are held, namely, from half past eleven on Sunday morning to one, and from seven to eight or half-past eight on Sunday night, and the Sabbath school from half-past three to half-past four on Sunday afternoon. He described the annoyances he suffered consequent on this racing on Sundays. [His Lordship referred to his evidence as given *ante*, p. 346–348.]

Another important witness was the Rev. E. Travers Crozier, who has been the curate in charge of the Chapel-of-Ease on Clonliffe-road for six years. This church is about 300 yards from the racecourse. [His Lordship read the evidence of Mr. Crozier, as given *ante*, p. 348.]

The evidence of these two witnesses has a very important bearing, not only on the general question of nuisance, but on the other ground of complaint I have mentioned, namely, the disturbance of Divine Service in their respective churches. They have fixed the hours at which their respective services conclude, that of the Methodist Church being at 1 p.m. and that at the Chapel-of-Ease being about 1 p.m., when the Holy Communion is not celebrated, and at 1.30 on Communion Sundays. But when the defendant Mr. Butterly came to give his evidence, he stated that the earliest time, to his knowledge, that the gates were opened for admission, was half-past one to open, and two to commence, adding, "that is the earliest time, and we have had them as late as three o'clock." This statement caused me some surprise, having regard to the evidence of Mr. Crozier and Mr. Gentleman, and to guard against any mistake I asked him, "Do you say half past-one?" He replied, "Yes, half-past one to open the gates, and commencing at two. Sometimes we were later than that. That is the earliest." I found it hard to reconcile this with the evidence of Mr. Crozier, who stated that the service in his church had been frequently

annoyed by the shouting and noise from the racecourse, and specially during the Communion Service, which ended at 1.30. However, when I sat next morning, counsel for the plaintiffs asked and obtained leave to recall and re-cross-examine Mr. Butterly. Counsel put into his hand an advertisement in the *Irish Daily Independent* newspaper of the 26th November, 1897, of the City and Suburban races for Sunday, the 28th November, at Jones'-road, in these words: "First race *1.30 sharp*"; and also in another part of the same paper, on the same day an announcement, "City and Suburban races, Sunday next, 28th November, *1.15*, the Clontarf Plate"; and in the same paper on the following day, 27th November, an advertisement, "Where to see a good day's sport to-morrow, Sunday. City and Suburban races, Jones'-road, First race, *1.15 sharp*. And in the same day's paper is an announcement of these races for the following day, Sunday, viz.: "The card comprises five events, and the first race, in order to make certain of good light for the concluding items, takes place *at 1.15* and *not at 1.30 as previously advertised*." It was admitted that these advertisements and notices were published by the defendants. He tried to explain this thus: [His Lordship referred to his evidence, as given *ante*, pp. 348, 349.] But he seemed not to notice that the time of the actual start was not the principal point, but the time that the gates opened, and the time at which the races were announced for. He could scarcely have ventured to state after the production of these advertisements that the gates were not to open till 1.30. After this I can place very little reliance on the accuracy of this witness's evidence. It certainly has not the slightest weight with me, as counterbalancing the plain straight-forward evidence of Mr. Crozier, upon which I have not a doubt in arriving at the conclusion that the services of his church were frequently disturbed by the shouting and uproar proceeding from the crowds who were brought together by Mr. Butterly and the co-defendants to this racecourse.

The plaintiffs also examined several officers and men of the Dublin Metropolitan Police, who proved that large crowds of people attended those Sunday races, and that they were more noisy and disorderly than at other race meetings, that there was a large amount of furious driving of vehicles going to the place, that there

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was a considerable obstruction of the roads and streets while the races were going on by vehicles standing there, and showing on the whole, that these Sunday races interfered seriously with the comfort and enjoyment of the quiet inhabitants of the neighbouring houses.

A large number of witnesses were examined on the part of the defendants, many of whom were inhabitants of houses in this locality, who differed widely in their evidence from that of the plaintiffs' witnesses, some of them as to the existence of the facts proved by the plaintiffs and their witnesses, but most of them as to their opinions, whether these facts caused any serious interference with the comfort and quiet of the neighbourhood. As to the principal matters of fact in controversy, I have in this conflict of testimony come to the conclusion, that the evidence on the part of the plaintiffs of matters of fact within their own personal observation has not been shaken by the evidence on the part of the defendants. I do not think that it is necessary to go through all this evidence for the defendants in detail, or to observe upon the manner or demeanour of the witnesses *seriatim*. As is usual in such cases, many of them were evidently partizans of the side on which they were examined, and others confined their evidence to matters of opinion, and I have no doubt gave their opinions conscientiously. But as to matters of opinion, I say that one man may consider certain facts as necessarily causing disturbance to the comfort and quiet of the district, while another may esteem these same facts as having no such effect, and a third may regard them as even enjoyable. Cases of this kind are not to be dealt with here according to peculiar sensibilities or tastes, but according to the common sense of reasonable men. No majority, however large, is entitled to interfere with the common right of a minority, though small, to the enjoyment of the comfort and quiet of their homes, and the free use of the public thoroughfares which lead to them. The Legislature alone, acting for the common weal, has this power entrusted to it.

On a full consideration of the evidence on both sides I have arrived at the conclusion, that the plaintiffs have sufficiently established that the setting up of this racecourse and the holding of horse races there, *especially on Sundays*, constituted

a nuisance to the plaintiffs and other inhabitants in the neighbourhood, and that this nuisance is of a grave character, materially interfering, during the holding of the races, with the comfort and enjoyment of their houses, and is one which they are entitled to call on this Court to prevent. I say "especially on Sundays," because on that day of the week there are far more facilities for the collection of crowds of idle and disorderly persons than on week-days. But I also use these words, because Sunday is by most persons in this realm looked upon as a day of rest, as it was originally appointed to be, and is recognised as such by our law, so that on that day noisy assemblies out of doors, and the other usual accompaniments of such races, would have a more serious and aggravated disturbing effect upon persons desirous of enjoying rest in quietness, than on week-days.

I am also of opinion that these races have been a disturbance to the celebration of Divine Service on Sundays in the church and chapel in their vicinity, which entitles the persons aggrieved thereby to a remedy by injunction.

The defendants contended that this action was not brought *bona fide* for the redress of the wrongs complained of, but has been got up and prosecuted by a number of persons not affected by this nuisance nor inhabitants of the neighbourhood of it, who entertain what are called Sabbatarian views of the observance of Sunday, which they seek to promote by putting down acts and practices which they conceive to be desecrations of the Lord's Day. I agree with the proposition that this Court cannot, under ordinary circumstances at least, interfere with the doing of lawful acts on the ground of their being opposed to the religious views of persons holding particular opinions on such subjects; but I totally dissent from the contention that persons, who are entitled to redress on legal grounds, are to be deprived of such rights, because the assertion of them carries with it a promotion of particular religious views. As a matter of fact the plaintiffs who were examined expressly denied that such was their motive, and asserted that this action has been brought by them for the redress of the serious wrongs occasioned by this nuisance. It was admitted by them that they are to be indemnified against costs by persons who are not plaintiffs, and who, it may be assumed, have given them this

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indemnity because they consider this Sunday horse-racing to be sinful. But surely the plaintiffs are not deprived of their right of action for the nuisance occasioned to them by the wrongful acts of the defendants, because these acts at the same time occasion, in the opinion of persons not affected by them as a nuisance, a desecration of Sunday as a day of rest and religious observance, which they are so desirous to see put an end to, that they are willing to indemnify the persons, who have a legal remedy, against the costs of proceedings to enforce it.

I decide this case without any reference whatever to religious opinions as to the due observance of Sundays.

It was also relied on as a defence that, from the absence of complaints to the persons holding these races, the plaintiffs are debarred from relief on the ground of acquiescence. I do not think that this contention has in this case any force. The nature of the case would require much stronger proof of acquiescence than exists here. The evidence of the defendant Butterly that he would not have stopped these races, if such complaints had been made to him, sufficiently answers this contention.

I shall therefore grant an injunction to restrain the defendants, their agents, and servants, from holding or continuing to hold on Sundays any horse races or race meetings, on the plot of ground called the racecourse in the pleadings mentioned, or otherwise disturbing the quiet and comfortable enjoyment of their houses, and gardens thereto belonging, by the inhabitants of the same in the neighbourhood of the racecourse on Sundays, and from interfering with or disturbing the celebration of Divine Service on Sundays in the churches or chapels in said neighbourhood, and from obstructing the streets, passages, and public roads, leading to or from said racecourse.

I direct the defendants to pay the costs of the action.

Solicitor for the plaintiffs: *Dennehy.*
Solicitor for the defendants: *Greene.*

J. MAC M.

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(1898. No. 207.)

May 11. June 4.

Appeal. June 27.

Will—Estate in realty—Gift of rents to S. M.—Proviso against incumbrance—Revocation in such event of the gift from S. M. and his heirs male—Remainder over in tail-male to W. M. in default of male issue of S. M.—Equitable estate in tail-male.

A testator by his will devised his estates to trustees to pay the rents half-yearly to S. M., but in case S. M. encumbered the lands at any time the testator revoked the gift of the rents from S. M. and his heirs *male*. In the event of S. M. so forfeiting the same, and dying without male issue him surviving, there was a remainder over to the testator's brother W. M. in tail-male:—

Held, that the frame of the will afforded a sufficient indication of the testator's intention to confer on S.M. an equitable estate in tail-male.

FRANCIS CRUMPE, late of Tralee, in the county of Kerry, M.D. made his will dated the 1st day of June, 1874, and thereby devised all his real estates, lands, tenements, and hereditaments in the counties of Limerick and Kerry, to the Rev. R. A. Orpen, Rev. Thomas Moriarty, and Richard Chute Mason, whom he appointed executors and trustees of his will, to dispose of the same in the following manner, viz.:—"After the gifts and annuities are provided from my personal property, and the investments effected for my nieces and the Church and poor from rents of lands and dividends of investments combined, I then devise my lands, fee-simple estates (by whatever name or tenure I hold the same) in trust to the executors and trustees of my will, to allow and give the rents (received by an agent) of my lands, to be half-yearly paid to and received by my nephew Silverius Moriarty, Barrister-at-Law, now in Tasmania, provided he in one year after he begins to receive those rents assumes by Royal license and adopts the name and arms of Crumpe, the surname of Crumpe, no other surname following or preceding the name of Crumpe,

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such name to be adopted by him and his heirs. And I further declare, no taker shall possess the rents of my estates who does not conform and comply with this mandate and desire; and I further declare the said Silverius shall receive said rents conditionally, that he the said Silverius shall have no power of encumbering these lands or rents by anticipation, or by debts, mortgages, mortgage bonds, bonds, promissory notes, bills of exchange, rent-charges, or any other legal security or device; and if the said Silverius does so at any time, although obeying the injunction given as to change of name, I then revoke the gift of the rents of these my fee-simple estates from the said Silverius, my nephew, and from his heirs male; or should the said Silverius not forfeit the same, and die without male issue him surviving, I then will and bequeath these rents and estates but conditionally to his brother Commander Moriarty R.N. and his issue male in tail male, his first and every other son lawfully begotten, and the conditions and restrictions under which he is to enjoy the same, he must relinquish all claim to the dividends of my investments in banks railway companies or any securities, and that he the said Commander William Moriarty R.N. and his heirs male shall in six months after he began to receive these rents assume, bear and take by Royal license the surname and arms of Crumpe, no other surname preceding or following the name of Crumpe, and that the said Commander William Moriarty R.N. shall have no power of encumbering these lands or rents by anticipation, or by bonds, mortgages, or any other legal security, and if he does so at any time I then revoke the gift of those rents and lands from him and his heirs male, or should he die without heirs male arriving to age or marriage, I under any of the above circumstances occurring, will and desire my executors and trustees to sell out each separate estate in the Landed Estates Court Dublin, and the produce thereof to divide into equal shares or portions."

The testator, after making certain other bequests, gave "the dividends from my investments to be half-yearly received by and made payable to my nephew Commander Moriarty R. N. during his life, giving him a life interest only in said dividends, or until he may happen to come into and enjoy my estates by decease of his brother Silverius, or by his brother

Silverius forfeiting enjoyment of said rents of said lands, or by his brother not forfeiting the same, but dying without issue male lawfully begotten him surviving," and on whichever of these events should first happen, the testator left the said investments as therein mentioned.

The testator died on the 1st April, 1877, and his executors, having obtained probate of the will on the 31st January, 1878, commenced an action for the administration of the real and personal estate of the deceased, and an order for such administration was made on the 26th June, 1878. By judgment on further consideration, dated the 8th March, 1882, Silverius Moriarty, having duly assumed the name and arms of Crumpe, was declared entitled to receive the rents and profits of the lands, which he continued to do up to the time of his death. Silverius Crumpe, otherwise Moriarty, executed a deed, dated the 30th June, 1882, disentailing the lands. He died on the 4th April, 1897, without leaving issue him surviving, and by his will, bearing date the 2nd March, 1892, devised the lands in the county Limerick to his wife Mary Crumpe for life, and after her death to Richard W. Tweedie and Charles Curling, upon trust, subject to certain annuities, for Theodore William Carte Moriarty and his issue male upon his assuming the name and arms of Crumpe; and in case Theodore Wm. Carte Moriarty should fail to comply with that condition or should die without issue male him surviving, he devised the lands to John Langford Sealy Crumpe, his heirs and assigns, conditional upon his assuming the name and arms of Crumpe, with remainder in the event of his failing to comply with such conditions to the plaintiff and his issue male. Silverius Crumpe further devised the lands in the Co. Kerry to the plaintiff and his heirs male, with remainders over.

Charles Curling predeceased Silverius Crumpe; and Richard W. Tweedie, the surviving executor, obtained probate of his will. Commander Moriarty died on the 9th July, 1886, without executing any disentailing deed, leaving the plaintiff, his eldest son, him surviving, who assumed the name and arms of Crumpe.

The question in the present action was, whether upon the true construction of the will of Francis Crumpe, Silverius Crumpe took a fee-simple estate, with an executory devise over, in which event the plaintiff would be entitled to an equitable estate in tail male.

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Price, Q.C. (with him *Ronan, Q.C.*, and *Chaytor*), for the plaintiff:—

The gift of the rents of the lands to Silverius without words of limitation was a gift in fee, with an executory devise over in case Silverius should die without male issue him surviving, an event which has happened. Therefore Silverius did not take an estate tail, and the disentailing deed had no effect. A further indication of the testator's intention is derived from the clause, providing that the name and arms were to be adopted by Silverius and his *heirs*. The words, "I then revoke the gift of the rents of these my fee-simple estates from the said Silverius and his heirs *male*," only show that the testator did not know the effect of the language he had used, and cannot operate to control the gift already made: see the judgment of Lord Herschell in *Foxwell* v. *Van Grutten* at p. 691 (1). The main purpose and intention of the testator are ascertained, and incorrect expressions must be discarded: *Towns* v. *Wentworth* (2); *Coltsmann* v. *Coltsmann* (3); *M'Enally* v. *Wetherall* (4); Hawkins on Wills, p. 7. Moreover, when the testator desired to give an estate tail he knew the proper terms to employ, as appears from the gift to Commander Moriarty, which is to him and "his issue male in tail male, his first and every other son lawfully begotten."

Matheson, Q. C. (with him *Blood*), for the defendant Theodore William Carte Moriarty, supported the contention of the plaintiff.

Serjeant Campion, Q.C. (with him *Twigg, Q.C.*, and *W. M. Jellett*), for the other defendants Mary Crumpe and Richard W. Tweedie:—

Our position is that by the express terms of the whole context of the will, and the clear result of the decided cases, Silverius Crumpe took an estate in tail male in possession; that having duly disentailed the estate, his will took effect, and by virtue of that will the defendant is now tenant for life in possession.

Down to the sentence, "I then revoke the gift of the rents of these my fee simple estates from the said Silverius and from his heirs

(1) [1897] A. C. 658.
(2) 11 Moore, P. C. C. 526.
(3) 15 Ir. C. L. R. 171; 17 Ir. C. L. R. 692; L. R. 3 H. L. 121.
(4) 15 Ir. C. L. R. 502.

male," there is nothing to define the nature and character of the estate given to Silverius. The testator then defines it by appropriate words of entail, "heirs male." The settled law is that a devise to a man and his "heirs male" constitutes an estate tail.

The sentence referred to reflects back upon the general terms preceding, and for the first time distinctively defines the estate by words, and is wholly incompatible with a fee-simple. Commander Moriarty admittedly got an estate tail in remainder, and the clause of revocation annexed to his estate is precisely in the same terms as those in the clause of revocation of the devise to Silverius. From the context it is plain that the testator's intention was that both nephews should have the same estate, *i. e.* an estate tail. The word "heirs" in the name and arms clause plainly means lineal heirs, and is compatible with an estate tail.

It is settled law that where a testator by his will unequivocally refers to a disposition as having been made by him in the same will, the Court, taking such statement as conclusive evidence of his intention to make such disposition, gives the testator's statement the effect of a direct and actual devise: *Bibin* v. *Walker* (1); *M'Clean* v. *Simpson* (2); *Biddulph* v. *Lees* (3); *Adams* v. *Adams* (4); *Yates* v. *Thompson* (5).

The only effect of the limitation over, in the event of Silverius dying without issue male him surviving, is to make the remainder contingent on a prescribed event. The words are not considered as explanatory of the species of issue taking under the prior devise, and therefore do not prevent the prior devisee taking the estate tail under such prior devise, with all the incidents and powers of such estate tail: *Eden* v. *Wilson* (6).

Ronan, Q.C., in reply:—

The gifts to Silverius and Commander Moriarty are radically different. The first is a general gift of rents and profits, the donee and his heirs to take the name and arms of Crumpe; the second is a technical gift of an estate tail, and the clause prescribing the adoption of the name and arms preserves the words "heirs

(1) 2 Ambl. 661.
(2) 19 L. R. Ir. 528.
(3) E. B. & E. 289.
(4) 1 Hare, 537.
(5) 3 Cl. & Fin. 544.
(6) 4 H. L. Cas. 257.

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male." The clause revoking the gift to Silverius in the event of his attempting to alienate the property is inoperative.

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The fact that there is a similarly worded restriction in the case of Commander Moriarty has been relied on to show that the interest of both was intended to be the same. But is an inoperative clause sufficient to control a gift? It is merely a misdescription of that gift. If the intention of a testator is not sufficiently clearly expressed, or if a testator unequivocally refers to an intention which he has not expressed, a sub-recital can create a gift; but that is not so in the case where a sufficiently clear gift is given in the first instance.

June 4.

THE VICE-CHANCELLOR :—

This is one of the numerous class of cases where a testator who has learned a few legal phrases, but is incapable of applying them correctly, has taken upon himself to be his own conveyancer. Many years ago I had in the suit for the administration of the assets of this testator to deal with numerous questions of more or less difficulty arising upon his will. Some necessarily remained undisposed of, and amongst others those that arise in the present action, and involve the title to his real estate, which is of considerable value. The action is brought by Redmond G. S. Crumpe, as eldest son and heir-at-law of William Moriarty, a nephew of the testator and one of the devisees of the real estate, against Mary Crumpe, who is the widow and devisee in the will of Silverius Crumpe, another nephew and devisee of the testator, and R. W. Tweedie, who is the surviving trustee of the will of Silverius Crumpe who claim under that will, the real estates of the testator in the counties of Limerick and Kerry. The contest is between the representatives of William Moriarty and the representatives of Silverius Crumpe, who respectively claim title to those estates on what each contends is the true construction of the will of Francis Crumpe. The plaintiff contends that Silverius Crumpe took only an estate for life in those estates, or an estate in fee with an executory devise over. The defendants contend that Silverius Crumpe took an estate tail, which he duly barred, and thus became entitled to dispose of the lands by his will. Francis Crumpe by his will devised them to trustees in fee, in terms sufficient to leave

the legal estate vested in them, but in trust to hand over the rents half-yearly to his nephew Silverius Moriarty, provided that he should assume the name and arms of Crumpe, such name to be adopted by him and his heirs; and he declared that Silverius should receive the said rents conditionally, that he should have no power of charging the lands, and if Silverius should at any time do so, he then revoked the gift of the rents from Silverius and *from his heirs male*, and should he die without male issue him surviving, testator willed his said estates conditionally to his other nephew William Moriarty and *his issue male in tail male, his first and every other son lawfully begotten*, upon certain conditions therein stated, and amongst others that he and *his heirs male* should assume and bear the name of Crumpe, and that he should have no power of charging the lands, and that if he should do so at any time, the testator then revoked the gift of those rents and lands from him and his heirs male, or should he die without heirs male arriving at age or marriage, the testator directed that his estates should be sold by his trustees, and the proceeds disposed of as by the will provided. The testator died in the year 1877, and Silverius duly assumed the name and arms of Crumpe, and he executed a disentailing deed in the year 1882, and in the year 1884 was put into possession of the estates. He died without issue in the year 1897, having made a will by which he devised the Limerick estate to his wife, the defendant Mary Crumpe, for life, with remainder to trustees, of whom the defendant Tweedie is the survivor, upon the trusts therein mentioned, and devised the Kerry estate, subject to certain charges, to the plaintiff and his heirs male, with remainders over.

William Moriarty died in the year 1886 without barring the entail, leaving the plaintiff his eldest son, surviving, and he has duly assumed the surname of Crumpe. He now claims to be entitled to all the testator's real estates under his will, contending that Silverius Crumpe was only tenant for life of the estates, and that upon his death without issue, he as first tenant in tail under the will of Francis Crumpe, became entitled as tenant in tail in possession.

The question then is, as to what estate Silverius took under the will of Francis Crumpe. The trusts declared by the testator,

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on which his trustees were to hold the estates, were to permit the rents to be paid half-yearly to Silverius Moriarty, provided that he should, within a year, adopt the name and arms of Crumpe, such name to be adopted by him and his heirs, and in case he should die without male issue him surviving then over. The plaintiff contends that this was a devise to Silverius of the estates without words of limitation, and that under the 28th section of the Wills Act it passed to him an estate in fee, but subject to an executory gift over in case of the death of Silverius without male issue living at his death. It may be doubtful whether this devise, even if it stood alone, would be such a devise as is contemplated by the 28th section of the Act. It was contended that the intention to give Silverius an equitable estate in fee is shown by the words "to be adopted by him and his heirs," and that independently of the Act, these words would give him the fee. The contention is not, in my opinion, well founded, for the word heirs may mean heirs in tail as well as heirs general. It certainly affords an argument against the plaintiff's contention that Silverius was only given a life estate.

The declaration that "*no taker*" shall possess the rents who does not comply with the testator's mandate and desire as to the name and arms, seems to show that he contemplated a succession of takers involving a tenant for life and remaindermen under the will. I pass over the prohibition of incumbering the lands as immaterial to the present questions, save as introductory to the revocation of the gift of the rents from Silverius and *from his heirs male*, which has been so strongly relied on by the defendants as showing an intention to limit an estate tail to Silverius. It is contended by them that they amount to a sufficient description of the nature of the estate, supposed and intended by the testator to have been given before to Silverius, namely an estate in tail male. The rule of law on this subject is, that if a testator by way of recital or sufficient description, clearly states that he has given by the same testamentary instrument an estate or interest which in fact he has not given, it is a sufficient indication of an intention on his part to give, and is therefore equivalent to an express gift. The rule seems to apply equally to the case of an entire absence of such a gift, and

to the existence of a gift of a different quality from that indicated, provided always that the language used sufficiently shows that the intention existed to give what the testator deals with as if he had actually given. Now here the testator having made an indefinite gift to Silverius, afterwards describes it as a definite gift in tail male, for he revokes the gift from him and his heirs male. This is, therefore, in my opinion, within the rule on the subject which I have stated. It is not a description of what was done or not done by any other instrument, which would be clearly inoperative.

This is followed by a gift over in the event of Silverius dying without issue male him surviving, which is of course the same as living at his death. This is not an indefinite failure of issue, and would not itself operate to create an estate tail. It is, however, of importance, when taken with the other parts of the will.

The trusts in favour of Silverius Moriarty are followed by a series of trusts in favour of William Moriarty and his issue, which do not present the same difficulties, for they in plain and express terms gave an equitable estate tail to him. There are many resemblances between the two sets of trusts, which have been relied on by the defendants as showing that the general intention of the testator was the same in both cases, while the plaintiff relies on the differences as showing that the testator intended to give different estates to the two brothers. I do not think that this is a very cogent argument either way, especially when taking into consideration the inaccuracy and unskilfulness of the testator, but if it is of weight on either side, I think it is in favour of the defendants' contention. No reason appears why the testator should make any difference between his nephews as to the nature of their interests. He places Silverius first, as the primary taker of his bounty, and it is not probable that, as to the nature and quantity of the interest he was to take, he intended to place him in a less favourable position than the second taker. I have, on a careful consideration of the whole will, and especially referring to the description given by the testator of the devise to Silverius, as being one to him and his heirs male, arrived at the conclusion that the interest given to Silverius was an equitable estate in tail male.

J. MAC M.

Appeal. 1898. CRUMPE v. CRUMPE. June 27.

The plaintiff appealed to the Court of Appeal (FITZGIBBON, WALKER, and HOLMES, L.JJ.).

Price, Q.C., and *Ronan, Q.C.* (with them *Chaytor*), for the appellant:—

We contend that this is a devise in fee to Silverius with an executory devise over in the event of his dying without issue him surviving. The gift of the rents indefinitely passes the fee to Silverius. The clause as to adoption of name, "such name to be adopted by him and his heirs," shows an intention to give him an estate in fee. The words of revocation cannot affect previous gifts: they are merely an inaccurate description of what he had already given: *Smith* v. *Fitzgerald* (1). The same case shows that there is no implication of a legacy by a recital unless it be clearly shown that there is nothing else to which it can refer. From the clause as to the dividends of the testator's investments, it is clear that the testator desired the estate to go over in default of issue of Silverius: *Van Grutten* v. *Foxwell* (2); *Towns* v. *Wentworth* (3); *Coltsmann* v. *Coltsmann* (4).

The scope of the will is to provide for two persons, Silverius Moriarty and Commander Moriarty. It is conceded that at the time of the will the former had no children, but the latter had. The argument of the other side is, why should there be any difference between the two bequests? Why should the scope of the will not have the same construction? The answer is that the language used in connexion with each gift is wholly different. There is nothing in common save the clause of revocation. There is a clear gift of rents, not confined to his life, to Silverius; and he is to take the name and arms of the testator.

If the whole clause is put together it is quite consistent. It is startling to say the gifts are the same. The clause as to the adoption of the name is different in each case. In Silverius' case the name is to be adopted by "*him.*" In Commander Moriarty's case by his "*heirs male.*" The words of gift too are quite different. The gift to Silverius is a gift of rents and profits. The gift to Commander Moriarty is a *precise technical* gift in tail male drawn with words

(1) 3 V. & B. at p. 8.
(2) [1897] A. C. 658.
(3) 11 Moore, P. C. C. 526.
(4) L. R. 3 H. L. 121.

of art. The only ground on which the Court is asked to read the gifts alike is because there happens to be a similar, but absolutely inoperative, revocation clause in both cases.

Cases of recitals have no application, because in these cases there was no previous gift at all. Here we have an antecedent gift; that is why the case of *Van Grutten* v. *Foxwell* (1) is so important. The words of revocation are not an apt description of an estate tail, as there must be words of procreation: *Baker* v. *Wall* (2). In a deed they would pass the fee. The manifest intention of the testator would be defeated by construing the gift as an estate tail.

Serjeant Campion, Q.C., and *Twigg, Q.C.* (with them *Jellett*), for the defendants Mary Crumpe and R. W. Tweedie:—

The appellant first assumes that the primary devise to Silverius was a devise in fee-simple, and then ignores altogether the clause which alone defines the tenure of the estate devised.

The first part of the devise to Silverius is simply in the following terms: "The half-yearly rents to be paid to and received by Silverius"; no words of limitation, or equivalent words, are superadded; the first terms defining the tenure are: "I then revoke the gift from Silverius and his heirs male." The testator thus himself defines the estate which he gives, and by appropriate words of an estate tail. It is one continuous sentence to the words "heirs male"; it is in effect a devise to Silverius, *habendum* to him and his heirs male; the last words of the clause simply define the general terms previously used, and are in perfect consistency with them.

William Moriarty concededly got an estate tail in remainder; and the revocation clause, as regards him, is in precisely the same terms as that with regard to Silverius, *i.e.* "from William and his heirs male." The intention of the testator on the face of the will was that both brothers were to be in the same position—both tenants in tail.

The only ground on which appellant's argument rests is the name and arms clause, *i.e.*, "such name to be used by Silverius and his *heirs*"; but the word heirs is as consistent with heirs of his body, as with a fee, and here necessarily means heirs of his body,

(1) [1897] A. C. 658. (2) 1 Lord Raymond, 185.

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to whom alone (*i. e.* lineal descendants of the first taker) such grants from the Crown are, or could be, made.

This is not the case of a recital or erroneous reference to a previous specific and defined devise, it is simply part of the one continuous sentence, the latter part defining the general language of the previous part of the same sentence, and perfectly consistent with it. This construction is fully sustained by the following cases: *Biddulf* v. *Lees* (1); *Darley* v. *Martin* (2); *Marshall* v. *Grime* (3); *Doe* v. *Rucastle* (4); 1st Jarman on Wills, 498.

The facts of the cases relied on by the appellant are essentially different as appears by the judgments in the particular cases: *Van Grutten* v. *Foxwell* (5); *Nugent* v. *Nugent* (6).

FITZ GIBBON, L. J.:—

The question is whether Silverius Moriarty took an estate tail in the lands devised to him, or an estate in fee-simple with an executory devise over in the event of his dying without issue him surviving. The will says: "I devise my lands, fee-simple estates (by whatever name or tenure I hold the same) to the executors and trustees of my will." If a testator gives "my estate in the lands," that phrase passes the entire interest possessed by the testator. But if a testator says—"I give my estate of Blackacre," the words may be merely descriptive of the thing given, and throw no light upon the effect of subsequent limitations of that subject-matter. Here the words "fee-simple estates" merely describe the lands—the subject-matter of the will. The words which next follow, declaring the trust, though sufficient to pass the beneficial interest, do not indicate an intention to pass the property out and out. The trust is "to give the rents (received by an agent) of my lands to be paid half-yearly to my nephew Silverius Moriarty." This trust is perfectly consistent with his taking an estate for life only. But then come the words—on which much stress was laid—"Provided he in one year after he begins to receive those rents assumes by Royal license, and adopts the name and arms of Crumpe, the surname of Crumpe, no other surname following or preceding the

(1) E. B. & E. 289.
(2) 13 C. B. 683, 691.
(3) 28 Beav. 375.
(4) 8 C. B. 876.
(5) [1897] A. C. 658.
(6) I. R. 8 Eq. 78.

name of Crumpe, such name to be adopted by him and his heirs." Mr. Price contended that "heirs" meant "heirs general," and that this "name and arms clause" impliedly described the heirs as takers of the land, and thus that the words "and his heirs" became words of limitation, and carried the fee and inheritance to Silverius Moriarty on complying with the condition. Serjeant Campion argued that because the grant of arms would not be to heirs general, but would specify heirs of the body, this clause would favour an estate tail; but this ingenious argument does not strictly apply to this direction, which is confined to the adoption of the *name* of Crumpe. Still, I think that, if the desire of the testator as to the adoption of his name were put into popular language, it would be expressed by a direction that the name should be adopted by Silverius Moriarty "and his *descendants*," and, so far, this name-clause indicates the *idea* of an entail. The clause forbidding incumbrance or alienation of the estate devised is neutral, being equally inoperative upon an estate tail and upon an estate in fee-simple. But then comes the revocation clause which purports to take away what has been already given, and this acts as an explanation of the previous gift. "I then revoke the gift of the rents of these my fee-simple estates from the said Silverius, my nephew, and from his heirs male."

The frame of the will appears to me to exclude the imputation of any mistake to the testator as to what he had already done, and entitles us to use this revocation clause as a "gloss" upon the preceding gift which it purports to revoke. I think that the whole passage must be read continuously as one entire disposition, and so reading it, the words at its conclusion indicate that "his heirs male" were included in the limitation to Silverius Moriarty. There is, as I have shown, nothing necessarily inconsistent with this limitation in what has gone before, and therefore I find, on the whole passage, a sufficient indication of the intention that "Silverius Moriarty and his heirs male" should be the devisees; or, in other words, that he should take an estate in tail male.

We cannot assume that an estate tail was not what the testator wished to give, from the fact that the law enables a tenant in tail to frustrate the intention expressed in the inoperative clause

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against alienation. In popular parlance a testator always "*entails*" an estate which he does not wish the devisee to alienate. The ingenuity of conveyancers and of Courts first, and the statute afterwards, gave power to defeat the desire to "entail" lands, and every estate tail is an estate which the creator of it desired to descend without alienation, but the *non-alienability* (if I may use such a word) of which can be got rid of by a lawful process.

The passage which I have read from the will is followed by a gift over, introduced by the words "should the said Silverius Moriarty die without issue him surviving." These may strengthen the conclusion, but I do not base my judgment upon them. In the preceding words I find the gift of an estate tail to Silverius Moriarty, and I rest my decision upon that.

The case of *Van Grutten* v. *Foxwell* (1) does not carry the appellant any further than the will does.

I am of opinion that the decision of the Vice-Chancellor should be affirmed.

WALKER, L.J.:—

One cannot understand what estate the testator gives Silverius Moriarty until the entire gift is read. It is a gift to trustees upon trust to give the rents to Silverius Moriarty provided he and his heirs take the surname of Crumpe. It cannot be that "heirs" in this clause means "heirs general." This is plain from its occurring in the "name and arms" clause. The words, "I then revoke the gift of the rents of these my fee-simple estates from the said Silverius, my nephew, and from his heirs male," are an explanation and definition of the gift. The testator revokes an estate tail. He could not revoke it unless he had previously given it.

I disregard the gift over to Commander Moriarty. It presents at least equal difficulties to the clause which we have to construe. To rely upon it would be to interpret *obscurum per obscurius*.

HOLMES, L.J.:—

I agree with Fitz Gibbon, L.J., that in cases of this class where the Court is called on to construe the will of an untrained

(1) [1897] A. C. 658.

and confused testator, authorities give little help. I may add that in such cases I obtained as little assistance from speculating on the testator's intention. I am unable to guess, still more to ascertain, what is known or conceived by a mind that seems incapable of conveying its ideas in intelligible language.

It is probable that the testator in the present case intended Silverius Moriarty to take an estate in tail male, as he understood the nature and incidents of such an estate. It is equally probable that he was wholly ignorant of its actual nature and incidents; and that he supposed, like many other laymen, that an estate in tail could not be diverted from the issue of the devisee.

I must, therefore, take the terms of art he uses—the edged tools with which he plays—and interpreting them according to legal principles, see to what conclusion they lead.

It is not admitted, although the contrary has not been argued, that if an estate to a man and his heirs were followed in a will before the Wills Act by the words "if he shall die without issue male him surviving," there being then a gift over, the effect would be to give the devisee an estate in tail male.

For my own part I cannot distinguish these words from the words, "if he shall die without leaving issue male," which undoubtedly would have implied in the case of real estate an indefinite failure of issue.

It is, however, unnecessary to consider this matter further, as I think that it is not, and I believe cannot be questioned, that if the foregoing words followed an estate in tail male, they would have been regarded as the ordinary introduction to a remainder upon that estate. If this be so the law is the same now, inasmuch as the 29th section of the Wills Act would not apply in such a case.

The question then is whether, preceding the words in question, there is a gift to Silverius Moriarty amounting to a limitation to him of an estate in tail male. Where the rents of the lands are first given him, there is no express indication of the nature or extent of the estate, although, of course, if there had been nothing more, the whole interest of the testator would have passed to him. In the name clause we have a reference to Silverius and his heirs; and although I would not be at liberty to cut down these words by mere speculation as to the testator's intention, I think it clear

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that what he meant was heirs of the body. There is, however, no need for speculation when I come to the subsequent words that immediately precede the gift over. They seem to me to amount to a declaration by the testator that the estate given to Silverius is an estate to him and his heirs male, the best known mode of conferring an estate in tail male by will.

This is not an erroneous recital of a gift already complete. It is part of the gift itself, and has both the character and effect of an interpretation clause. I, therefore, concur in affirming the judgment appealed from; but, like my colleagues, I am unable to find any guidance in the terms of the gift to Commander Moriarty, which is, I think, much more difficult to construe than the devise with which I have been dealing.

Solicitors for the plaintiff: *Sutton & Son.*

Solicitor for the defendants Mary Crumpe and R. W. Tweedie: *Crozier.*

G. Y. D.

V.-C. 1899. Feb. 15, 16. March 8.

BOLE *v.* SMITH.

(1898. No. 364.)

Construction of statutes — Cumulative remedy — Drainage and Navigation (Ireland) Acts, 1842 to 1857 — Maintenance rate — Power of entry — Appointment of receiver — Drainage (Ireland) Act, 1842 (5 & 6 Vict. c. 89), sects. 111, 121 — Supreme Court of Judicature Act (Ireland) 1877 (40 & 41 Vict. c. 57), sect. 28 (8).

Section 111 of the Drainage (Ireland) Act, 1842 (5 & 6 Vict. c. 89), dealing with sums specified by award under the Act, and thereby charged on land in respect of expenditure for drainage or improvement thereof, provides that in certain events it shall be lawful for the Commissioners of Public Works, or any person authorized by them, to enter upon the land and receive the rents and profits thereof; and that it shall be lawful for the Court of Chancery, upon the application by petition of the Commissioners, to appoint a receiver

of the rents and profits; and that it shall be lawful for the Commissioners, if they shall so think fit, to raise the sum charged by mortgage of the land. Section 121, dealing with sums fixed as a maintenance rate, provides that the Commissioners and trustees, respectively, shall have the same powers, rights, and privileges, by entry or mortgage, to enforce the payment of such sums, as were given to the Commissioners for enforcing payment of sums charged under their award.

In an action brought by trustees of a drainage district for the appointment of a receiver in respect of arrears of a maintenance rate :—

Held, that there was jurisdiction to appoint such receiver.

ACTION by Ambrose Bole, Wentworth H. King-Harman, and Alexander C. Kingston, against William Smith, Denis Skelly, and Bridget Flanagan, for a declaration that the sum of £59 6*s.* 10*d.* arrears of drainage maintenance rate assessed pursuant to 5 & 6 Vict. c. 89, s. 121, in respect of the years 1891 to 1895 inclusive, was well charged on the defendants' lands of Clonmore and Sharvogue, in the county of Longford, and that payment of same might be enforced by receiver or otherwise as the Court should direct.

The statement of claim alleged :—The plaintiffs were the trustees of the Keenagh Arterial Drainage District in the county of Longford, which district was duly constituted as a drainage district under the Act 5 & 6 Vict. c. 89, and the Acts amending the same : a large sum was, pursuant to the said Acts, advanced by the Treasury for the execution of drainage works in the said district, and the works were completed in 1857 ; the Commissioners of Public Works made their final award, dated the 7th April, 1858, and thereby awarded that the lands drained and improved within the said district were those described in the Schedule A to said award, and stated that the works which had been completed for the drainage and improvement of the said lands were those described in the schedule B to said award, and the Commissioners thereby specified and awarded that the proportions in which the lands so drained and improved, and the proprietors of such lands in respect thereof respectively for the time being should in future be annually charged towards the costs and expenses which might be incurred in maintaining, &c., the watercourses, &c., were as stated in the said schedule A. In that schedule the lands of

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Clonmore and Sharvogue were specified as parcels of the land drained and improved, and situate within the said district, and were declared liable to contribute 0·13585 of the expenses of maintenance: the defendants were and had been in each of the years from 1891 to 1895, both inclusive, proprietors within the meaning of the 5 & 6 Vict. c. 89, of the lands of Clonmore and Sharvogue or parts thereof, being owners thereof in fee-simple. On the 3rd March, 1891, the plaintiffs, under the powers conferred by the Act, determined and fixed for the purpose of discharging expenses of maintenance in the then current year a sum whereof the proportion chargeable on Clonmore and Sharvogue was £10 17*s.* 8*d.*, and in 1892, 1893, 1894, and 1895, determined and fixed certain sums for expenses of maintenance in the then current years respectively, the total amount chargeable for the five years on the said lands being £59 17*s.* 10*d.*; a sum of 11*s.* had been paid on account thereof, leaving £59 6*s.* 10*d.* due. The parts of said lands of which the defendants were proprietors were valued at over £30 per annum; the defendants were in possession or receipt of the rents and profits of the lands, or of parts thereof, sufficient to pay the said sums for maintenance in each of the said years. The statement of claim prayed a declaration that the sum of £59 6*s.* 10*d.* was well charged on the said lands, and that same might be raised by sale thereof, or by a receiver, or in such other manner as to the Court should seem fit.

The defence, in addition to traverses and other allegations, stated that by an apportionment certificate issued by the Commissioners of Public Works in Ireland, dated the 30th April, 1896, under the Drainage and Improvement of Land (Ireland) Act, 1892, it was declared that the proportions in which the said lands should in future be annually charged should be those set forth in the schedule thereto, and that the parcels or portions of land therein set out should not be liable to the maintenance rate further than was determined by the said certificate. The schedule specified the proportion of the rate to be borne by, amongst others, each of the defendants, viz. 0·01433, 0·01954, and 0·01469, respectively.

The facts of the case will sufficiently appear from the judgment of the Vice-Chancellor.

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Fetherstonhaugh, Q.C. (with him *J. F. Vesey Fitz Gerald*), for the plaintiffs, referred to the Drainage (Ireland) Act, 1842 (5 & 6 Vict. c. 89), and in particular to sections 23, 106, 110, 111, 120, 121; the Public Works Loans Act, 1888 (51 & 52 Vict. c. 39), s. 6; the Drainage and Improvement of Land (Ireland) Act, 1892 (55 & 56 Vict. c. 65), s. 11; and the Drainage (Ireland) Act, 1856 (19 & 20 Vict. c. 62), s. 39.

O'Connor, Q.C., and *P. Law Smith*, for the defendants:—

It is an oppressive proceeding to sue the defendants for the maintenance rate of the entire of Clonmore and Sharvogue: the plaintiffs might have proceeded for the apportioned parts by civil bill: Drainage (Ireland) Act, 1856 (19 & 20 Vict. c. 62), s. 39.

Moreover, the plaintiffs have mistaken their remedy: they ask for a sale and a receiver, but they are not entitled to either, inasmuch as special remedies are provided by the statute. Section 111 of the Act of 1842 does not apply to a maintenance rate—the previous section makes this clear—and it gives three remedies for the recovery of arrears of the sums charged under the award, viz.—1, right of entry; 2, petition for receiver; 3, power to mortgage. Section 121 deals with the maintenance rate, and it provides special remedies for its recovery, but these are confined to two only of the powers conferred for enforcing the sums fixed by the award, viz. power to enter and power to mortgage. This must have been done intentionally—the drainage moneys are large, and are advanced on the security of the land, while the maintenance rate is of small amount, and is intended to be a tax on the proprietors similar to poor rate or county cess. As to the effect of a change of expression or the use of different words in the same statute, see *Guardians of Parish of Brighton* v. *Guardians of Strand Union* (1). Where a statute prescribes a particular remedy, there is no other: *Stevens* v. *Evans* (2); *Underhill* v. *Ellicombe* (3); *Stevens* v. *Jeacocke* (4); *The Queen* v. *County Court Judge of Essex* (5), and the judgments there (pp. 707, 708) of Lord Esher, M.R., and Lopes, L.J.: *Handley* v. *Moffatt* (6); *Treasurer Ennis-*

(1) [1891] 2 Q. B. 156, 167.
(2) 2 Burr. 1152.
(3) M'Clell. & Y. 450, 455.
(4) 11 Q. B. 731, 741.
(5) 18 Q. B. D. 704.
(6) I. R. 7 C. L. 104.

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killen Loan Fund Society v. *Green* (1). In *Shepherd* v. *Hills* (2), the statute gave a cumulative remedy. The Act of 1842 should be treated as a fiscal statute, and should be construed strictly: see *Partington* v. *Attorney-General* (3). See also *Stockton Railway Company* v. *Barrett* (4); *Rex* v. *Croke* (5). Section 39 of the Act of 1856, shows that the Court has no inherent power to deal with the recovery of the maintenance rate. [Counsel also referred to sections 5 and 6 of the Act of 1888, and section 11 of the Act of 1892.]

Fitz Gerald, in reply:—

Proceedings were already taken in the County Court against the defendants for their proportions of the rate, and they resisted same. All other remedies are preserved by the 39th section of the Act of 1856. Section 11 of the Act of 1892 is not expressed to be retrospective, and on ordinary principles it cannot be held to be so; it confers all powers possessed by collectors of county cess, and it could not have been intended to give a right of distress for antecedent arrears; it incorporates section 6 of the Act of 1888, and that is not expressed to be retrospective. Moreover, the certificate is expressly future in its operation, and the County Court Judge and the Judge of Assize held that the apportionment did not apply to the rates now in question. Section 5 of the Act of 1888 is not incorporated in the later statute—it deals with charges for advances, not maintenance rates.

The remedies provided by section 121 of the Act of 1842 are not exclusive: the cases cited were cases of personal remedies or of fiscal Acts. The Act here is not a fiscal Act; the provisions in question provide for repayment of loans for improvements on private lands and should receive a liberal, not a strict construction. Section 121 does not prescribe any particular mode of entry; it cannot mean an entry *vi et armis*; it means the ordinary legal mode by applying to the inherent jurisdiction of the Court for the appointment of a receiver. See *Wolverhampton Waterworks Company* v. *Hawkesford* (6) and the cases collected in the notes

(1) [1898] 2 I. R. 103.
(2) 11 Ex. 55.
(3) L. R. 4 H. L. 100, 122.
(4) 11 Cl. & Fin. 590.
(5) Cowp. 26.
(6) 28 L. J. C. P. 242.

to *Ashby* v. *White* (1) in 1 Smith's Leading Cases. Reading section 111 in connexion with section 121, it will be manifest that the former gives in reality only two remedies, viz. by entry and by mortgage, the application for a receiver being only a mode of carrying out the power of entry. Further, the fact that the Act gives power to appoint a receiver on summary petition does not oust the jurisdiction of the Court to do so in an action. We do not ask for a sale.

March 8.

The Vice-Chancellor:—

This action is brought by the trustees of the Keenagh Arterial Drainage for the recovery of arrears of the proportion of the expenses of the maintenance of the drainage works payable in respect of the lands of Clonmore and Sharvogue under the Drainage Acts. The Drainage Board of the Keenagh Drainage System was duly constituted and the works completed in or about the year 1857. The trustees for the maintenance of the drainage works were duly constituted and were empowered and required to levy rates for maintenance of the works upon the proprietors under the Drainage Acts charged with such maintenance, including the lands of Clonmore and Sharvogue. The Commissioners of Public Works duly made their award, dated the 7th April, 1858, by which they charged on the lands in said district, specified in the schedule to the award, the sum therein mentioned for the execution of the drainage works, and which included the lands of Clonmore and Sharvogue, and the proportions thereof charged on all the said lands respectively, and they further awarded that the proportions in which the lands so drained and improved, and the proprietors of such lands in respect thereof, respectively for the time being, should in future be annually charged towards the expenses which might from time to time be incurred in the maintaining and keeping in repair the several works so executed, and the rate which should be payable in respect of said lands respectively towards these maintenance works for the year next ensuing the date of the award should be as stated in the schedule to the award. This was done under the authority given to the

(1) 2 Lord Raymond, 938.

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Commissioners under the 106th section of the Act of 1842, which required them to specify in the award the proportion in which the lands improved, and the proprietors of such lands in respect thereof respectively for the time being, should in future be annually charged towards the expenses to be incurred in maintenance, and to specify according to such proportions the rate which should be payable towards such expenses for the year next ensuing the date of the award. The 120th section provides for the appointment of trustees for each such district by the proprietors of the lands therein comprised who are authorized to make and maintain such works in the lands drained as they shall think necessary for draining and preserving the same. By the 121st section, the trustees are directed to hold annual meetings, and once in each year to determine the sum to be contributed and raised during the year for maintenance and other purposes, and to assess the proprietors of said land for the payment of all sums which might be required for the purposes last aforesaid, that is to say, for the maintenance of the works, and enacted that the said several sums so rated and assessed should be charged on the lands so drained or improved in priority over all incumbrances; and it provided that the said Commissioners and trustees should have the same powers, *by entry or mortgage*, to enforce the payment of same as were given to the Commissioners by the Act for enforcing sums under the award.

The trustees held the annual meetings so directed, and each year ascertained the annual amount to be provided for maintenance charges, and calculated the proportions in which they were to be assessed and charged on the several rateable lands in the schedule to the award.

The 23rd section of the Act defines the persons who are to be deemed proprietors of land, and for brevity I shall describe them as persons having any estate in possession of not less than a lease for years of which forty shall be unexpired. The only proprietor in respect of the lands of Clonmore and Sharvogue specified in the award was Mr. Francis H. Synge.

By sect. 6 of the Public Works Loans Act, 1888, the Commissioners of Public Works were empowered, where land was subject to any land improvement or drainage charge, on the application of the Drainage Board of the district in which such lands are

situated, to apportion the charge between different portions of the same land and to issue a sealed certificate setting forth such apportionment; and it was enacted that upon any apportionment being made under this section, so much of the charge as is apportioned to each portion of land should alone be deemed to be charged on that portion. This enactment did not comprise the maintenance charges, but a further Act was passed, the Drainage and Improvement of Land (Ireland), Act 1892, by the 11th section of which it was provided that the Board of Works should have the like power of apportioning the liability to pay a proportion of a maintenance rate under the Drainage Acts between different portions of the lands as they had of apportioning a rentcharge under section 6 of the Public Works Loans Act of 1888. There appears to have been no difficulty about the payment of the annual maintenance charge till about the year 1891, when purchases by tenants of portions of Mr. Synge's estate gave them interests in their respective portions, qualifying them to be proprietors of land under the Drainage Acts. Objections were made to the rates being assessed according to the award of the 7th April, 1858, and the trustees applied to the Commissioners to apportion the liability to pay the maintenance rate between different portions of Clonmore and Sharvogue under the provisions of the Acts of 1888 and 1892. The Commissioners accordingly under the powers given them by those Acts, made their certificate under seal dated the 30th April, 1896, and declared that the proportions in which the lands as mentioned in the award (so far as specified in the schedule thereto), should *in future* be annually charged towards the expenses which might from time to time be incurred for maintenance works, should be as stated in the schedule thereto, and that the said maintenance rate should be apportioned accordingly among such parcels of land as were specified in the schedule, and the Commissioners further declared that such parcels of land respectively should not be liable to the said maintenance rate further than was determined by the certificate.

This certificate changed the incidence of the maintenance, which before was one entire sum for each of the townlands of Clonmore and Sharvogue, charged upon and payable out of the entire rateable land therein respectively, and substituted for this a number of

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separate shares charged upon, and payable only out of the particular holding on which it was thus newly apportioned. The drainage trustees must thenceforth assess the annual sum required for maintenance upon each one of these new divisions. Any proceedings necessary for recovery of these subdivided rates must be necessarily instituted only against the land out of which each portion was to be paid, or the proprietors in respect of it.

The drainage trustees demanded payment of all the arrears of maintenance then due, calculated in the new method, from these proprietors. These arrears were due for the years 1891, 1892, 1893, 1894, and 1895. They were met by the objection that the certificate was not retrospective, and that there was no liability to pay these arrears in the manner demanded. A civil bill process was thereupon served upon the defendant Samuel Smith, who was one of the proprietors, for the recovery of those five years rates and also for the year 1896. It came on for hearing, and the learned County Court Judge held that the only amount which could be recovered in that proceeding was the rate due for 1896, and he decreed accordingly. There was an appeal from this decision to the Judge of Assize, who confirmed the decision of the County Court Judge. This could only have proceeded on the view that the certificate was not retrospective. This question has now been raised before me, and my opinion is in accordance with the decision of the Civil Bill Court and the affirmance of it by Fitz Gibbon, L. J. It appears to me that the powers of the Commissioners in granting the new certificate, changing the existing liabilities to payment of this rate, could not have been exercised retrospectively. I am also clearly of opinion that they did not attempt to do so. Its language is clear; it is that they certify and declare that the proportions in which the lands *shall in future* be annually charged, shall be as therein; that the maintenance expenses are those which may from that time be incurred; and that the maintenance rate shall be apportioned accordingly; and also that such parcels *shall not be* liable to this rate further than is thereby determined. This is all language of futurity, and there is not a word bearing a different operation. If there were any doubt, which in my opinion there is not, the principle of interpretation of statutes would be against a retrospective operation. I therefore

hold that the maintenance rates were up to the date of this certificate chargeable as they had previously been, that is, that each portion of the particular parcel of the chargeable lands as they were before the certificate should be charged with the payment of the entire amount chargeable upon it prior to the certificate. Accordingly the lands of Clonmore and Sharvogue (which had been previously dealt with together), continued liable to the payment of the entire sum payable in respect of these lands which might have been recovered out of them or any part of them and from the proprietors in respect thereof jointly.

But another defence was that the trustees have no right to proceed for recovery of the sums due by an action for the appointment of a receiver, but only by entry or mortgage. It was contended that this was a liability created by statute, and for the enforcement of which particular remedies were given by statute, and that therefore the statutory remedies can alone be resorted to. It is, no doubt, a rule of construction of statutes that when a new liability is created by statute and remedies are specially given by such statute for enforcing such liability it will be intended, on the rule that *expressio unius est exclusio alterius*, that negative words are not necessary to be expressed, and will be implied. This rule, though general, is not imperative. The remedies here specified would, if confined as the defendants contend, be inadequate and inconvenient. The 121st section gives the trustees the same powers, rights and privileges, by *entry or mortgage*, to enforce the payment of maintenance charges as were given to the Commissioners for the enforcing of sums charged under their awards. These powers are found in section 111, which enacts that if sums charged under awards shall be in arrear it should be lawful for the Commissioners, *or any person authorised by them*, to enter upon the lands charged, and the rents and profits of such lands to receive and take until thereby or otherwise the sums so due with interest, and the costs and expenses attending or occasioned by such entry and receipt of the rents, profits, and issues of such land shall be fully paid and satisfied. It then gave power to the Courts of Equity upon application by petition to appoint a receiver of the rents, profits, and issues of such land for the purpose of raising the sums so due. It also provides that it should be lawful for the

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Commissioners to raise such sums and interest and all costs and expenses attendant thereon by mortgage of such land or a competent part thereof. The defendants contend that as there is no mention in section 121 of the remedy by the appointment of a receiver, therefore it is intentionally excluded by the Act, and cannot be availed of for payment of maintenance charges. If these are necessarily considered as three distinct remedies it might be argued, whether successfully or not, that this strange operation should be contemplated by the Act. The only convenient remedy would thus be excluded. It certainly would not be desirable that without any legal proceeding the Commissioners should have to enter themselves, which would be absurd, or by an agent appointed by them, upon the land charged, and receive the rents, issues, and profits of the lands till the sum due was paid. Rather than give such an operation to the clause I should hold that the words "by any person authorised by them" may be construed to apply to a receiver appointed by this Court on the application of the Commissioners or the trustees, and that the expression of the power to appoint a receiver was a mode of working out the power to authorise some person to receive the rents and profits. The course of the Commissioners or trustees, if they should decide on making an entry on the lands, would be what would be done, but far more suitably, by a receiver appointed and controlled by this Court, namely, taking the rents and profits of the lands charged and applying them to payment of the charge. In the case of charges on land this Court has inherent jurisdiction to appoint a receiver as incidental to a proceeding in respect of such a charge. That jurisdiction cannot, in my opinion, be excluded without clear and express statutory enactment. The Judicature Act provides that a receiver may be appointed by order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order shall be made; and certainly in a case like the present I think it would be both just and convenient. I cannot therefore hold that it is not open to the trustees to apply for and obtain the appointment of a receiver.

The remedy by mortgage would I think be quite inapplicable, for it would only oblige the trustees first to obtain a number of loans, at great expense if they could be obtained at all, and then

for the lenders to adopt the ordinary course of entering as mortgagees or instituting suits for a sale and receiver.

Then it was said that a remedy is given by the 19 & 20 Vict. c. 62, s. 39, for recovery of a maintenance charge by civil bill against the proprietor for the time being, but this is expressly stated to be without prejudice to any power then vested in the trustees of such drainage works for the recovery thereof. It is, therefore, impossible to contend that this is not a cumulative remedy in addition to the powers given by Act of the 5 & 6 Vict. c. 89. It is the duty of the Court to deal with the question of the costs of a proceeding for the appointment of a receiver, if it shall appear that a more costly proceeding has been instituted than the cheaper remedy by civil bill; but here I must observe that the course adopted by the defendants to evade or retard the recovery of these charges, for which in some shape or other they are justly liable, and the litigation they have already imposed upon the trustees, who are only discharging their public duties for recovery of charges for work, the benefit of which has been received by these defendants, disentitles the defendants, in my opinion, to complain of what they call a hardship. The remedy by civil bill has been already attempted, and has been resisted and defeated by them as to charges prior to the last certificate, and would be possibly open to considerable difficulty which, however, does not exist as to the recovery of sums accrued since the subdivision of the charges took effect.

Some other grounds of defence were also put forward which appear to be quite unfounded.

I shall, therefore, give judgment against the defendants in the terms of the prayer of the plaintiffs' claim, and with costs to be paid by the defendants.

Solicitor for the plaintiffs: *Wilson.*

Solicitor for the defendants: *Delany.*

D. M'C. M.

Appeal. 1899.
Feb. 8, 9, 10.
May 5.

GREEN *v.* *IRISH INDEPENDENT* CO., LIMITED.
SAME *v.* *FREEMAN'S JOURNAL* CO., LIMITED (1).

Copyright—Design—Infringement—Penalties—Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 6, 11.

Plaintiff, as the owner of a design under the Copyright Act of 1862, brought an action for damages and penalties against T. & Co., a firm who had inserted, without authority, the plaintiff's design as an advertisement in the two newspapers owned by the defendants in the present actions respectively, and also separate actions against these defendants claiming damages and penalties in respect of each copy of the newspapers which contained the advertisement as being an infringement of his copyright. The Master of the Rolls held the plaintiff entitled to damages, but not to penalties against T. & Co., but finding as a fact that the owners of the newspapers had acted without bad faith or negligence, he dismissed the actions against them. No appeal was lodged against the judgment in the action against T. & Co.; but the plaintiff having appealed in the actions against the owners of the newspapers:—

Held (Fitz Gibbon, L.J., *diss.*), reversing the decision of Porter, M.R., that the plaintiff was entitled to a penalty in respect of each copy of the newspapers containing the reproduction of the design, though the publication took place without bad faith or negligence.

The penalty of one farthing was awarded in respect of each copy published.

Semble: the plaintiff would have been entitled to penalties as well as damages against T. & Co.

Appeals from the decision of the Master of the Rolls in two separate actions against the owners of two newspapers, claiming damages and penalties for breach of copyright. The facts and arguments are fully stated in the report of the case in the Court below ([1899] 1 I. R. 47).

O'Connor, Q.C., and *Herbert Wilson*, for the plaintiff.

O'Shaughnessy, Q.C., and *J. J. Clancy*, for the *Irish Independent* Co. (Ltd.)

Serjeant Dodd, and *Ignatius O'Brien*, for the *Freeman's Journal* Co. (Ltd.)

(1) Before Fitz Gibbon, Walker, and Holmes, L.JJ.

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FREEMAN'S JOURNAL CO.

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FITZ GIBBON, L.J.:—

We have now to deal with appeals by the plaintiff against orders of the Master of the Rolls of January 14, 1898, dismissing two of three separate actions which were brought by the same plaintiff, for infringement of his copyright in the same design, described as "a drawing representing Santa Claus laden with toys, a boy and a girl running towards him, and baby in chair."

The facts are as follows:—The plaintiff is a lithographic printer carrying on business at Leeds as a publisher of pictorial advertisements. In 1896 R. Bownass, an artist in his employment, made for him the design in question, and the plaintiff, as the proprietor of the copyright, registered it at Stationers Hall, on November 28, 1896. The certificate of registration given in evidence has not any copy of the drawing annexed, but it has been assumed that the drawing actually registered was Bownass design, on a sheet of plain paper or cardboard, containing the figures of Santa Claus and of three children, but nothing more. It had no letterpress or other matter upon it. Before registering the design, the plaintiff, in October, 1896, had prepared for Todd, Burns, & Co., of Dublin, and he afterwards sold to them, some 200 copies of a large poster, on which Bownass design appeared, but also containing the name of the purchaser's firm, and an announcement of a Christmas Bazaar to be held at their establishment. Afterwards the plaintiff also prepared and sent to Todd, Burns, & Co., a sketch for a smaller handbill, or advertisement, which was a reduced copy of their poster. But they did not give him any order for this handbill. The sketch was prepared by the plaintiff, by cutting out a small lithograph of the group of Santa Claus and the children, pasting it on a sheet of paper, and adding in very conspicuous lettering the announcement of Todd & Burns' Christmas sale. Todd & Burns' manager, without the plaintiff's consent, sent this sketch to the office of one of the two Dublin evening papers which are now sued, with an order to publish it as an advertisement. Some other copy or duplicate, not in proof, was sent with a similar order to the other paper, and each of the papers published a small reproduction of the sketch, as an advertisement, on the order of Todd, Burns, & Co. The newspapers acted in good faith, in the ordinary course of their business, on the order

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of a responsible customer, and in complete ignorance of the plaintiff's rights. So far as I can see, it would have been impossible for them, by any means short of an actual inspection of the register at Stationers Hall, to discover that any copyright existed in the design, and even such an inspection would not have disclosed any design which bore the name of Todd, Burns, & Co., or the announcement of their sale.

Having seen the advertisements, the plaintiff made a claim for infringement of his copyright, both against Todd, Burns, & Co., and also against each of the newspapers. The *Evening Herald* had published 110,900, and the *Evening Telegraph* 140,311 copies of the newspaper containing this advertisement. In April, 1897, the plaintiff issued a writ against Todd, Burns, & Co. alone, and on May 21, 1897, he issued two separate writs, one against the proprietors of each newspaper, as the sole defendants. The three actions were heard together by the Master of the Rolls on January 14, 1898. He refused to award any penalties against Todd, Burns, & Co., because he did not think that the penalties ought to be cumulative, or in addition to damages. But he gave a decree against that firm for damages which he estimated at 50 guineas, which sum he regarded as "full and ample compensation, erring if at all on the side of excess." He dismissed the actions against the newspapers, holding that they ought not to have been instituted, and that he was not bound to give penalties, where there was no impropriety of conduct, and no *mens rea*. The plaintiff took no further step until January 10, 1899, when, four days before the time would have expired, he served notice of appeal.

The questions which we have to decide are first, Whether an actionable infringement of the plaintiff's copyright was committed by the proprietors of the newspapers? Secondly, If so, whether the infliction of penalties is *ex debito justitiæ*? and thirdly, If so, what is the amount of the penalties which, under such circumstances, the Court *must* award, in a case in which the plaintiff has already recovered against a solvent defendant, and has been paid on a liberal scale, full compensation for any pecuniary loss which he has sustained. In his judgment, the publication in the newspapers is the matter for which the Master of the Rolls gave the

compensation "full and ample" which he awarded to the plaintiff against Todd & Burns.

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My individual opinion is of no practical importance, but, such as it is, it is my duty to state it; especially as the case is important, not only to the parties before us, but in its bearing upon the law of copyright.

The statute on which the case turns is the Copyright Act, 1862, 25 & 26 Vict. cap. 68. The offences against that Act are defined in sect. 6 in the following terms (I quote only the material words):—

> "If any . . . person, not being the proprietor . . . of copyright in any . . . drawing . . . , shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale or distribution, any such work or the design thereof; or,
>
> "Knowing that any such repetition, copy, or other imitation, has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, . . . or distribute, . . . any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person, for every such offence, shall forfeit to the proprietor of the copyright . . . a sum not exceeding ten pounds; and all such repetitions, copies, and imitations, made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietors of the copyright."

The defendants, having no knowledge of any unlawfulness in the transaction, certainly did not commit any offence against the second clause of this penal enactment, and that clause is material only for the purpose of interpreting the first clause.

Notwithstanding the general repugnance of our law to the creation of any offence where there is no *mens rea*, and the indication of a recognition of this principle in the use, in the first clause, of the words "*colourably imitate*," I feel myself coerced by

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the authorities cited for the plaintiff to hold that knowledge of the existence of the copyright is not essential to the offences created by that clause. It is otherwise under the second clause. There are analogies in the laws relating to adulteration, to the sale of intoxicating liquors, and to some other cases, and a comparison of the Act of 1862 with the earlier Copyright Acts fortifies the conclusion that the protection of copyright in duly registered drawings by the penalties under sect. 6, clause 1, extends to even morally innocent infringements by ignorant parties.

But I am not satisfied that what the proprietors of the newspapers did in this case was a violation of the terms of the Act, which, especially in such a case as this, must be most strictly construed. Though with doubt, I should hold that the thing published in the newspapers was *not a copy* of the registered design. The plaintiff was the proprietor of that design; if he had sent it, or a copy of it, as it was, to Todd, Burns, & Co., and if the newspapers had published it, although innocently, I think that they must have been held liable to the penalty. But Bownass design was only part, and was not either the most conspicuous or the most important part, of the sketch which the plaintiff sent to Todd, Burns, & Co. That sketch was, in fact, a reduced copy of the poster of which 200 copies had been sold by the plaintiff to Todd, Burns, & Co., without reservation of copyright, and apparently before registration. By incorporating Bownass design in the advertisement of Todd, Burns, & Co.'s Christmas sale, the plaintiff seems to me to have materially altered it. He made it *ex facie* no longer a more or less artistic group of figures, and he turned it into what appeared to be an advertisement of Todd, Burns, & Co. Though he did not consent to their publishing it, he made it *ex facie* the sketch of an advertisement belonging to them. He thereby not only put innocent parties off their guard, but he appears to me to have so changed the whole work as to make it a materially different "design" from that which was registered at Stationers Hall.

Where is the principle to stop, if this advertisement is regarded as identical with Bownass design? Could Todd, Burns, & Co. have photographed their shop, with one of the purchased posters hanging in each of the windows, and sent out copies of the photo-

graph as an advertisement? If the plaintiff had cut out the figure of Santa Claus, retaining the figures of the three children, and had substituted, for some other customer, some other figure, or some other object of the children's excitement, and had turned the sketch into an advertisement of some different class of goods interesting to juveniles, and had put that customer's name and address upon the design so changed, would the reproduction of that have been an infringement of the copyright in Bownass' Santa Claus group? I cannot think that it would, and, as a juror, I should be prepared to find that the advertisement of Todd Burn's Christmas Bazaar which appeared in the defendants' newspapers was a materially different design from, and was not a "copy" of Bownass drawing, which is registered at Stationers Hall.

Passing from that question, what is the offence defined by the statute which the defendants have committed? Of what, and of how many offences are they guilty? This, like many criminal and other penal statutes, enumerates a number of offences alternatively:—"*repeat*, *copy*, OR *otherwise multiply*." Each of these three is an offence. Under the criminal law, when a statute penalizes—say an assault with various intents, *e. g.* to maim, to disfigure, to injure, or the like—or with various effects, *e. g.* occasioning grievous bodily harm, or actual bodily harm, or the like; or uses analogous, or nearly synonymous words to describe the offence, the jury have to pick out the one charge which the evidence fits, and to convict upon that alone.

It appears to me that the publication of quarter of a million newspapers did not necessarily involve the defendants in the same number of separate and distinct offences. On the contrary, such a publication seems to me to be a single act, much more appropriately described by the word "multiply" than either by the word "repeat," or by the word "copy." "Copy" implies one reproduction; "repeat" implies more than one, and "multiply" implies many. If the plaintiff is entitled at all to a penalty, it seems to me that justice and the words of the Act will be fully satisfied by convicting the defendants of the single offence of having *multiplied* the plaintiff's design, and by the imposition of a single penalty for that one offence. This penalty I should measure at a nominal amount, because full compensation has

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been already paid to the injured proprietor of the copyright in question, and the legally guilty offender is morally innocent. In any case it could not exceed £10, and 251,211 farthings make £261 13*s.* 6¾*d.*

But even if each newspaper constitutes a distinct offence, I am not satisfied that the law compels us to punish a number of offences, for each of which a farthing is far more than an adequate penalty, by awarding as many farthings as there are offences included in the aggregate of offences. The only reason for awarding a farthing is that it is the smallest coin of the realm, and if one of those coins is an adequate penalty for an aggregate of offences, I cannot see that we are forced to give more than one farthing for the lot. The minimum of damages is fixed at a farthing only because execution cannot be issued for less.

In this case we are to remember that all pecuniary loss has been repaid, and we have only to vindicate the letter of the law against a morally innocent victim.

In one of the cases cited the Judge did not award, and apparently the plaintiff did not insist on, as many farthings as there were offences, and although in some cases the number of farthings and of offences have been the same, there is no decision binding us to follow that course in every case. The circumstances of this case furnish no analogy to a case where a work of art has been reproduced in the form of distinct copies, each of which is intended to be sold, and the sale of each of which lessens the value of the copyright, by substituting the sale of a piracy for the possible or probable sale of a legitimate copy or *exemplar* of the original.

The way in which these three actions have been instituted and conducted fortify me in the resolution to give nothing more to the plaintiff against the newspapers than the letter of the law imperatively demands.

Under the Judicature Act, I think that Todd, Burns, & Co. and the two newspapers might have been made co-defendants in a single action At all events only two actions, one against each newspaper joining Todd, Burns, & Co. in each as co-defendants, ought to have been brought. Had that course been taken, the consequences could have been visited on the really guilty party, by giving a remedy over against Todd, Burns, & Co. to the innocent

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defendants, whom that firm had procured unwittingly to violate the law, and the plaintiff ought not, in my opinion, to be enabled to make the newspapers ultimately liable for any penalty, compensation, or costs, which could not be recovered over from the principal offender.

In one important particular I believe that we are all agreed; namely, that the principle adopted by the Master of the Rolls in his decree against Todd, Burns, & Co. cannot be sustained, and that he was bound to award a penalty or penalties before or when awarding compensation. Under sect. 11 of the Copyright Act of 1862 the recovery of damages is expressly given as a remedy "*in addition* to the remedies thereby given for the recovery of penalties and forfeiture."

We cannot hold ourselves obliged to decree penalties against the newspapers, after the damages have been recovered against Todd, Burns, & Co., unless we are of opinion that the same penalties ought to have been inflicted upon the principal offenders, and we are prevented from giving effect to this view of the law now, by the plaintiff having brought three separate actions, and having so made it impossible for us now to visit the formal consequences of their acts upon the original offenders, who have submitted to the much smaller liabilities which the plaintiff has accepted from them by not appealing against the refusal of penalties against Todd, Burns, & Co.

The result of awarding many times more against the newspapers than against Todd, Burns, & Co. is one which I cannot reconcile with justice, and I can only hope that its injustice may not have tempted me to unduly refine the law in endeavouring to avoid it.

WALKER, L. J.:—

This is an appeal against a judgment of the Master of the Rolls, who dismissed without costs the actions brought separately against each of the defendant Companies.

The plaintiff is a colour printer and lithographer in Leeds, and in 1896 he executed, by the hands of Robert Bownass, a paid artist in his employment, a drawing representing Santa Claus laden with toys, a boy and girl running towards him, and a baby in a chair.

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On the 31st of October, 1896, the plaintiff submitted to Todd, Burns, & Co. a sketch of a large poster, on which the drawing was represented, with a view to obtaining orders for copies, and ultimately, on the 11th November, he obtained an order for two hundred copies of the large poster, part of the terms of purchase being that the plaintiff should not dispose of it to any other Dublin house. He also sought an order for a smaller reproduction of the poster, and on the 7th of November he sent the secretary of Todd, Burns, & Co. a reduction of the drawing adapted for a circular and coloured by hand.

The large sketch was returned to the plaintiff, but the smaller one was not.

On the 28th November, 1896, the plaintiff caused the copyright of the drawing to be registered at the Hall of the Stationers' Company, pursuant to the 25 & 26 Vict. c. 68, in the names of Bownass as author and of himself as proprietor.

In December, 1896, the secretary of Todd, Burns, & Co. called at the offices of each of the defendant newspapers, and gave orders to each for illustrated advertisements of a sale of Christmas toys, handing to one of them the small coloured circular of the design sent by the plaintiff. The defendants, in good faith, and in ignorance that there was any copyright in the drawing, or that it was registered, executed the order, and accordingly the *Independent* Company reproduced the sketch in the form of an advertisement in their issues of the *Evening Herald* of the 12th and 19th December, and the *Freeman* Company in five issues of the *Evening Telegraph*, beginning on the 19th December.

In fact the advertisement appeared in four issues of the *Evening Herald*, but the plaintiff's complaint in the pleading was limited to two.

In April, 1897, the plaintiff became aware of the advertisements in the newspapers, and he then brought three separate actions, one against Todd, Burns, & Co., claiming an injunction and damages, and also penalties under the statute, and one against each of the newspapers, claiming damages and penalties. Each of the defendants traversed the plaintiff's title, and the two newspaper Companies paid into Court nominal sums in respect of the damages and penalties.

The Master of the Rolls, in the action against Todd, Burns, & Co., awarded to the plaintiff £52 10*s.* damages, but refused to give any penalties; and he dismissed each of the actions against the defendant newspapers, without costs.

The plaintiff did not appeal from the judgment in the case of Todd, Burns, & Co. disallowing him penalties, and in fact has allowed the time for appealing to expire, but he has appealed from the judgment in the case of each of the newspaper Companies, and insists that he is entitled under the provisions of the sixth section of the Copyright Act of 1862 to damages and penalties, or if not to both, to at all events penalties, against each of the newspapers.

Before I approach this question, I may say as regards some minor points that I think it is clear that the plaintiff's right is not affected by the sale of the 200 posters to Todd, Burns, & Co., and also I think that the drawing was well registered: *Nottage* v. *Jackson* (1).

As regards damages or compensation for injury done him, I think he cannot claim such now from the defendants, because all his damages have been assessed in the action against Todd, Burns, & Co., and he has got judgment for them. But the great question remains, whether the plaintiff is entitled to penalties against the newspapers, and if he is, can he insist on being paid a nominal penalty at least for each copy of the newspapers published on the several occasions, or only one penalty for the whole issue, *i. e.* in the case of the *Evening Herald* two penalties, and in the case of the *Evening Telegraph* five penalties?

This question depends on the true construction of the Copyright Act of 1862. The 1st section of that Act enacts that the author of every original painting, drawing, and photograph mentioned, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such, and the design thereof. This section is valuable for the purpose of illustrating the use in section 6 of the word "multiply." It means adding to the number thereof by the means specified or otherwise.

By the 6th section, the offender, in each of the cases specified, is directed to forfeit to the proprietor of the copyright, a sum not

(1) 11 Q. B. Div. 627.

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exceeding £10. The first case is, if the offender shall, without consent, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, any such work or the design thereof. The second case is if, knowing that any such repetition, copy, or other imitation has been unlawfully made, he imports it into the United Kingdom; and the third case is, if with like knowledge, he offers it for sale, hire, exhibition, or distribution. The act of causing or procuring it to be done is in each of the three cases made a like offence. All repetitions, copies, and imitations, made contrary to the Act, are ordered to be forfeited to the proprietor.

By the 11th section, where the author has the rights mentioned in section 6, he may "in addition to the remedies hereby given for the recovery of any such penalties and forfeiture of any such things as aforesaid, recover damages by and in a special action on the case to be brought against the party so offending." Now, in the first place it cannot be said that a newspaper Company which prints and publishes in a case like the present, is in the position of a person who merely does the mechanical printing work; the employment is to print and publish, and the intention was that the reproduced drawing should circulate as largely as the circulation of the newspaper admitted. Each issue would circulate more or less extensively in every county in Ireland, and it was intended that the copied drawing should everywhere be reproduced to the readers of the paper.

Further, the construction of the section—applicable to Bownass' drawing of Santa Claus and its reproduction in an evening paper—must be the same as if the original drawing was by Millais and its copying by an engraving in the *Art Journal*.

The offence of a man who copies, repeats, or otherwise multiplies, is complete, though he is ignorant that he is copying the original work of another or that it is registered as copyright. This is so by comparison with the other two branches of the section into which, for apparently good reasons, knowledge is imported, and from express decisions: *Gambart* v. *Sumner* (1), decided on the 17 Geo. 3, c. 57, which is in complete analogy to the Act of 1862, and *West* v. *Francis* (2). Then, if the proprietor is entitled to recover a penalty, how far does the right extend? Can it be said

(1) 5 H. & N. 5. (2) 5 B. & Ald. 737.

that the penalty is confined or may be confined to the one issue of the paper, though 500 or more papers may be printed, published, and circulated in respect of that issue? I do not think it can. Each copy circulates or may circulate in a different district, and reproduces the drawing there. It does as much injury as if the offence were confined to 100 separate issues of the paper on different days circulating by one copy through the country. It seems to me that wherever and however the offender repeats copies or colourably imitates or otherwise multiplies, he commits the offence. If this were not so, take the case of a great work of art, copied by engraving by one complete process from which thousands of copies are obtained and circulated in one day through the United Kingdom—the act, according to the argument, would be only one multiplication, though the market of the real author was closed by the act of the offender. The words "every such offence" in the section are referable to the making of a copy, and where science enables 500 copies to be made by the same machinery as one, the reproducer is an offender in respect of each reproduction. The words "otherwise multiply" in the 6th section are explained by the words that precede them. They are the same as "multiply" in section 1; they mean an unauthorised addition in number to the original, whether by copying or otherwise.

I think that the decisions support the view that there must be a penalty for each copy issued and circulated. In *Ex parte Beal* (1) the defendant was convicted of reproducing and selling twenty-six copies. He had sold two parcels of thirteen each, and it was argued that there were only two sales. Blackburn, J., after referring to the terms of the 6th section, says:—"It is quite clear that this imposes a penalty for every copy sold; a different construction would result in an absurdity and defeat the intention of the Legislature"; and after referring to the case of the importation of a cargo of copies he proceeds:—"The Legislature were dealing with an offence which was likely to be committed wholesale, and they have used words meaning that the sale of every copy shall be an offence, and if ten copies shall be sold at one time ten offences are committed, and the offender may be punished for each separately."

(1) L. R. 3 Q. B. 387.

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In *Melville* v. *Mirror of Life* (1) there were 8000 issues of the defendant's paper in which the photograph in question appeared, but the plaintiff's counsel left a discretion to the Judge as to the number of copies in respect of which a penalty should be imposed, and he accordingly awarded a penalty of £5 to the plaintiff. In *Ellis* v. *Marshall & Son* (2) the thing reproduced was a photograph of Miss Mary Moore, and the defendants published it in copies of their magazine. Charles, J., gave a penalty for each separate offence, *i.e.* a penalty for each copy, assessing the amount at one farthing, which he considered he was bound to allow. He gives his reason:—"I have, according to the authorities, no alternative." The Master of the Rolls considers that case distinguishable upon the ground that the defendants could not rely on ignorance of the plaintiff's right, and because it was not the case of a man who takes an advertisement and gives it to a publisher.

That seems to me to raise the question whether want of knowledge in the reproducer of the property in the thing reproduced, and its registration, constitute a defence.

For the reasons already given by me I do not think it does.

I should have been glad if I had been able to come to the conclusion either that the newspapers were not in circumstances like the present within the scope of the Act or that the Court had control over the amount of the penalties. Not being able to do so, and thinking, like Charles, J., that I have no alternative, I am of opinion that there must be judgment for the plaintiff against *The Freeman's Journal* for £146 3*s.* 1¾*d.*, and against *The Independent* Co. for £71 19*s.* 7*d.*

HOLMES, L.J.:—

The act complained of in these actions is the printing by the defendant Companies in their respective newspapers of an illustrated advertisement on the order of a trading firm of high standing in this city. The representatives of the defendants had no reason to believe that by doing so they were infringing any private right or violating any statute. They were acting in the ordinary course of business, and if they have made their principals liable for the

(1) [1895] 2 Ch. 531. (2) 64 L. J. Q. B. 757.

heavy penalties sought to be recovered, it cannot be said that they were conscious wrongdoers.

In these circumstances a Court is naturally reluctant to come to a conclusion adverse to the defendants, and this reluctance is the greater when it knows that the plaintiff has already received from the real culprit full compensation for the injury done him. At the same time, as in our system of jurisprudence, the decision of to-day becomes the precedent of to-morrow, we must take care lest the hardness of the case may cause us to fall into legal fallacies.

The statute now in force that relates to copyright in works of art is 25 & 26 Vict. c. 68, and although when it became law pictorial advertisements were almost unknown, a large business in these productions has recently grown up under its protection. The mode in which this business is carried on is illustrated by the evidence in these cases.

The plaintiff, a colour printer in Leeds, has in his employment a staff of artists, to one of whom called Bownass he pays a weekly sum which, even in this age of culture, does not, by its moderation, negative the possession of the artistic faculty. Bownass, in October, 1896, executed a drawing which has been produced in Court, and which represents Santa Claus distributing toys amongst children. The subject is a familiar one, but the treatment of it by Bownass is original, and no ground has been suggested for holding that it is not a drawing within the meaning of the first and other sections of the statute. The original sketch was afterwards registered in the name of Bownass as author, and of the plaintiff as proprietor of the copyright. That this was, under the circumstances, the legal mode of registration, is shown by *Nottage* v. *Jackson* (1), and *Kenrick* v. *Lawrence* (2). Another objection to the registration, founded on insufficient description, is disposed of by *Ex parte Beal* (3), and as the fact of registration is admitted in the pleadings, the certificate produced, even if defective by reason of its not having annexed to it a copy of the drawing, need not have been given in evidence at all. Therefore it must be held that the drawing executed by Bownass was duly registered, and that the plaintiff was the proprietor of the copyright. The mode in which

(1) 11 Q. B. Div. 627. (2) 25 Q. B. Div. 99. (3) L. R. 3 Q. B. 387.

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the latter used it for the purpose of his business was to reproduce it, plain or coloured, on a large—I might almost say a gigantic—scale, and to sell these reproduced copies by the hundred to tradesmen dealing in Christmas toys, with the name and place of business of the purchaser printed over and under or around the picture. The copies so bought were then displayed by the buyer in whatever manner seemed to him to be best calculated to advance his business. Green also reproduced the drawing on a scale much smaller than the original, and sold these copies by the thousand to tradesmen in the same way to be used by them for the purpose of circulars.

I venture to lay down three propositions suggested by the foregoing statement:—

1. The protection given by the registration of the original sketch extends to reproductions of it on either a larger or smaller scale. If it were otherwise the statute would be valueless, and if authority is required I refer to *Lucas* v. *Cooke* (1).

2. The sale by the plaintiff of copies of either the large poster or of the small circular gives the purchaser no right to reproduce them. In most of the reported cases for infringing the copyright of pictures or engravings, the act complained of was the reproduction of a copy legitimately acquired.

3. The plaintiff's copyright is not affected by the words of advertisement attached to the copies sold by him. They are merely the framework of a picture which is protected by the law, whatever may be its frame.

The facts of the present cases are that the plaintiff sold two hundred of the enlarged coloured copies of the Santa Claus drawing to Todd, Burns, & Co. At the same time he sent them a copy of the smaller reproduction, soliciting an order therefor. Of course both the large posters and the specimen circular had above and below them the words of advertisement required by the firm for the purposes of its trade. At the time these documents were received by Todd, Burns, & Co., the original drawing had not been registered, nor had anything been said by the plaintiff to show that registration was intended. But, accord-

(1) 13 Ch. Div. 872.

ing to the opinion of the majority of the Court in *Tuck* v. *Priester* (1), copyright then existed, although the plaintiff, until he registered it, was not entitled to the benefit of the Act of 1862; and there is, I think, no doubt that, even irrespective of the statute, the firm could from the first have been restrained by injunction from reproducing the design. Todd, Burns, & Co. ought certainly to have returned the specimen circular, whether they ordered copies of it or not. But instead of doing so they kept it in their possession; and after the drawing had been registered, but without knowledge of the registration, they gave it to the defendant Companies to be reproduced in their respective newspapers, and circulated therein as an advertisement.

It is, I think, impossible to draw any distinction between Todd, Burns, & Co. and the defendants as to liability under the statute of 1862. The acts done by each of the defendant Companies were also done by Todd, Burns, & Co. The former did what they were directed to do, and were paid for doing so by the latter, and the one had as little reason to think that the sketch was protected by registration as the other.

I turn now to the sixth section of the Act, which it is argued by the plaintiff entitles him to the penalties sued for in these actions. The offences dealt with in that section may be conveniently divided into three classes: 1, to repeat, copy, colourably imitate, or otherwise multiply, or to cause to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution any painting, drawing, or photograph protected by the Act or the design thereof without the consent of the proprietor; 2, to import or cause to be imported into the United Kingdom any such repetition, copy, or other imitation, with knowledge that it has been unlawfully made; 3, with similar knowledge to sell, publish, let to hire, exhibit, or distribute any such repetition, copy, or imitation, or to offer to do any of the said acts, or to cause or procure any of them to be done.

There is a marked and manifest distinction between the offences in the first class and those in the other two. Knowledge, which is

(1) 19 Q. B. D. 48, 629.

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an essential element in the latter, is wholly omitted from the description of the former. There is a reason for the difference. The person who in the ordinary course of business, imports or sells or otherwise makes public prints or drawings, has often no means of knowing or inquiring into the title of those from whom he purchases or procures them. He may be, and generally is, a tradesman buying them from other dealers or from collectors, and they may have passed through several hands before they come to his. But the person who actually makes the copy is in a different position. He knows what he takes it from; and it is not too much to expect him to see that he has the consent of the proprietor. If he reproduces for sale or distribution paintings or drawings without making himself acquainted with their history, it is just that he should do so at his peril; and, therefore, the penalty is imposed upon him irrespective of his knowledge or ignorance. Thus there seems to be a good reason for the distinction; but whether it is reasonable or not, there is, I think, no doubt that it exists. The language of the section is clear; and it hardly requires such cases as *Gambart* v. *Sumner* (1), and *Cooper* v. *Whittingham* (2), to interpret it.

What, if any, was the offence committed by the defendant companies? It was not an offence within either the second or third class, inasmuch as although they published and sold copies of the drawing, they did not know that the copies were unlawfully made. But did they not procure to be repeated or copied, for the purposes of sale, the design that had been registered? I find it impossible to hold otherwise. I am not acquainted with the mechanical process by which the sketch on the specimen circular was reproduced on wood, stone, or metal, and repeated therefrom in every copy of the *Evening Herald* and *Evening Telegraph* that contained the advertisement. But I know that this was effected by some process, and it seems to me that the result was to make the defendant companies liable for the penalties imposed in the 6th section of the statute—that is to say, for every offence, the forfeiture to the proprietor of the copyright of a sum not exceeding ten pounds, and also the forfeiture of the repetitions, copies,

(1) 5 H. & N. 5. (2) 15 Ch. D. 501.

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and imitations. It is indeed startling in the circumstances of the cases before us that defendants should be held liable for a penalty in respect of every individual newspaper. But other cases can be readily conceived in which it would be equally startling that a wholesale reproduction of a work of art could only be punished by a single penalty. The artistic methods by which a great picture is copied by line engraving, etching, or mezzotint, do not differ in kind so essentially from the means by which the common-place drawing of Bownass was transferred to the newspapers, as to justify a different interpretation of the language of the statute as applied to each. Chromographs and photogravures of considerable value are multiplied almost without limit by purely mechanical processes; but a penalty of £10 for the whole batch would be quite inadequate.

The legislature had in view probably cases of this kind, and not newspaper advertisements; but the language used applies alike to all. If every copy of a picture imported or sold is under the later portion of the section liable to a penalty (and of this there can hardly be a doubt), how can it be said that every copy made or produced is not also liable under the earlier portion? The sale of twenty copies may be a single act, a single price being paid for and a single delivery given of all; and yet there must be a penalty for each of the copies so sold, *Ex parte Beal* (1): so too there must be a penalty for each copy printed for the purpose of sale or distribution. It has been suggested that the words "or otherwise multiply," implies the production of many copies. But "multiply" is not used here in its technical, arithmetical sense, and in its ordinary meaning an addition of one is as much a multiplication as an addition of ten. "Multiply" is interpreted by the preceding words, "repeat, copy, imitate." One thing at all events is certain, that we must choose between the two constructions, either a penalty for each copy produced, or a penalty on all the copies produced on the same occasion. It is certainly not open to a Court in applying the provision to the same state of circumstances to impose several penalties under the words, "repeat or copy" or to make it a single penalty under the word "multiply."

(1) L. R. 3 Q. B. 387.

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I am of opinion that the true construction is that a penalty is recoverable for every copy produced; and of the cases under this and similar sections that have been reported, I do not know one in which this view has not been taken. Therefore, I feel bound to award at least a nominal penalty for every copy; and I know no better way of doing so than to make it a farthing for each. It seems to me that unless the penalty is measured by some coin recognized in our national system of coinage, the provision of the Legislature is disregarded. This, according to the figures given by the Master of the Rolls would, I believe, amount to £146 3*s.* 1*d.*, in the case of the *Freeman's Journal* Company. In the case of the *Independent* Company, the statement of claim claims, in respect of only two issues, that of the 12th and 19th December, 1896, the aggregate of which was 69,100; and calculated at one farthing each, the amount would be £71 19*s.* 7*d.* These are the sums for which I think judgment ought to be given. I am, however, of opinion that the plaintiff was not justified in bringing three separate actions claiming damages and penalties in each. He ought to have had only two actions, one against each of the two newspaper companies, with Todd, Burns, & Co. joined in both.

It has been argued that the judgment recovered against Todd, Burns, & Co. is now an answer to the other actions. I hold it to be, so far as the damages are concerned, *Brinsmead* v. *Harrison*(1); but I doubt if the principle of this case would apply to penalties. No question, however, of this kind arises, inasmuch as the action against Todd, Burns, & Co. was dismissed in so far as penalties were claimed in it. The needless multiplication of suits is a good reason for refusing the plaintiff his costs in these actions previous to the appeal; but he is entitled to his costs of appeal.

Solicitors for the plaintiff: *Larkin & Co.*

Solicitor for *Irish Independent* Company, Limited: *W. T. Sheridan.*

Solicitors for the *Freeman's Journal* Company, Limited: *J. L. Scallan & Co.*

G. Y. D.

(1) L. R. 7 C. P. 547.

DUCKWORTH *v.* LEE (1).

Appeal.
1898.
Nov. 24, 25.

Donatio mortis causa—*I O U.*

An I O U cannot be the subject of a *donatio mortis causa.*

APPEAL from an order of the Vice-Chancellor, declaring that the delivery of an I O U by the creditor on her death-bed to the wife of the debtor constituted a good *donatio mortis causa* of the debt. The question arose on further consideration of the chief clerk's certificate in an action brought by the executor of the deceased against the donee.

The debtor, who was the husband of the defendant, gave Mrs. Smith an I O U for a loan of £100, obtained by him from her, promising her at the same time to pay her interest at four per cent. The document was in the following form:—"I O U one hundred pounds," and was signed by the debtor. It contained no reference to the agreement to pay interest. Mrs. Smith, on her death-bed, handed the I O U to the debtor's wife, under such circumstances that the Vice-Chancellor found that the delivery was made in expectation of death, and that the gift was to be absolute only in the event of the donor's death, and being of opinion that the delivery of such a document under such circumstances constituted a valid *donatio mortis causa* he held the defendant entitled to the debt of £100.

Ronan, Q.C., and *Blood*, for the plaintiff:—

An I O U is only evidence of an account stated: *Laycock* v. *Pickles* (2). The production of such a document is not essential to enable the party suing to recover the debt in respect of which it is given: *Wilson* v. *Marshall* (3). The document in this case is

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

(2) 4 B. & S. 497. (3) I. R. 2 C. L. 356.

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quite different from those that were discussed in *Moore* v. *Darton* (1), and the difference lies in this that the receipts in that case were essential for the proof of the debt: here, on the contrary, the document does not evidence the entire debt, for it makes no mention of the interest. Delivery of a bank pass-book, which is an account stated of a higher order, does not constitute a valid *donatio mortis causa* of the balance at the bank: *M'Gonnell* v. *Murray* (2). In Byles on Bills, at p. 178, it is said that delivery of an I O U does not make a valid *donatio mortis causa.*

Gordon, Q.C., and *Ball*, for the defendant:—

A chose in action can be the subject of a *donatio mortis causa:* thus policies of assurance pass by this form of gift, *Witt* v. *Amiss* (3): though the statute requires them to be transferred in writing: so does a cheque payable to the donor, or order, though not indorsed: *Clement* v. *Cheeseman* (4). Since the Judicature Act all choses in action are assignable: the principles relating to incomplete gifts to volunteers have no application to the case of a *donatio mortis causa:* a deposit receipt marked on its face "not transferable" has been held to pass in this manner: *Cassidy* v. *Belfast Banking Co.* (5); *Porter* v. *Walsh* (6). *Moore* v. *Darton* (1) is not distinguishable from this case. The document delivered to the defendant identifies the debt. Romilly, M.R., in *Hewitt* v. *Kaye* (7), expressly mentions an I O U as being the subject-matter of a good *donatio mortis causa:* so, too, does Williams on Executors (9th Edition, p. 685).

[They also cited *Fesenmayer* v. *Adcock* (8); *Duffin* v. *Duffin* (9); *Cain* v. *Moon* (10); *Melanotte* v. *Teasdale* (11).]

Nov. 25.

LORD ASHBOURNE, C.:—

The circumstances of this case were fully discussed before the Vice-Chancellor, who arrived at a conclusion on the facts, which

(1) 4 De G. & Sm. 517.
(2) I. R. 3 Eq. 460.
(3) 1 B. & S. 109.
(4) 27 Ch. D. 631.
(5) 22 L. R. Ir. 68.
(6) [1895] 1 I. R. 284; [1896] 1 I. R. 148.
(7) L. R. 6 Eq. 198.
(8) 16 M. & W. 410.
(9) 44 Ch. D. 76.
(10) [1896] 2 Q. B. 283.
(11) 13 M. & W. 216.

has been accepted by both parties for the purposes of this appeal. The only point discussed before us was whether the delivery by the deceased to the debtor's wife of the I O U for £100, given by the debtor to the deceased, constitutes a valid *donatio mortis causa* of the debt due to the deceased.

Speaking for myself, I do not look with any particular favour on these death-bed gifts. The current of authority shows that Courts require claims resting on such gifts to be closely scrutinized, and to be made out clearly and satisfactorily, without extending the class of things which have already been held capable of transmission *mortis causa*. The document which was handed over by the deceased was an I O U of the most bald and meagre form. It was, no doubt, evidence of the debt due to the deceased, but it was nothing more. It was not essential for her to produce it if she had sued the debtor for the amount she had lent him. It did not even state the entire debt; for it is admitted that the debtor agreed to pay, and actually did pay, some interest on the loan; but the I O U was wholly silent as to this. The document handed over was therefore, at best, but imperfect evidence of the debt in respect of which it was given, and which the respondent contends passed by its delivery. It has never been held that delivery of a document which evidenced part of a simple contract constituted a valid *donatio mortis causa* of the debt. If the Court were to yield to the respondent's contention, it is hard to see how it could logically stop short of holding that the delivery of any symbol of indebtedness would make a valid *donatio mortis causa* of the debt.

In all the cases which have been cited where the gift has been upheld the document or deed delivered was essential to the recovery of the debt. Thus gifts of a policy of assurance: *Witt* v. *Amiss* (1), of a bond, and a mortgage deed: *Duffield* v. *Elwes* (2), have been held good. So, too, has the delivery of a deposit receipt: *Duffin* v. *Duffin* (3); *Cassidy* v. *Belfast Bank* (4). Mr. Ball relied strongly on *Moore* v. *Darton* (5), which he contended was an authority that delivery by the deceased of a receipt for money

(1) 1 B. & S. 109.
(2) 1 Bligh (N. S.) 497.
(3) 44 Ch. D. 76.
(4) 22 L. R. Ir. 68.
(5) 4 De G. & Sm. 517.

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given to him by a person who had obtained a loan from him formed a good *donatio mortis causa* of the debt. But that case presents salient features, which are wanting here. The receipt there was in the following form:—"Received, the 22nd October, 1843, of Miss Darton, £500, to bear interest at 4 per cent. per annum, but not to be withdrawn at less than six months' notice." This receipt was therefore evidence of the entire debt and of all the terms of the loan; it proved all the terms of the contract; and, as the contract was created by writing, proof of the writing was essential to recovery upon the contract. Delivery of a document of that sort was therefore wholly different from the delivery of a document like this I O U, which was, as I have pointed out, only imperfect evidence of the terms on which the £100 was lent, and not essential for its recovery.

We were also referred to the decision of Lord Romilly in *Hewitt* v. *Kaye* (1), and Mr. Ball naturally pressed us with the passage which he read from the judgment in that case. The passage, however, was not necessary for the decision; it is only a sort of inferential aside. In any event I am not prepared to follow it in the face of express disapproval with which it is mentioned by Walsh, M. R., in *M'Gonnell* v. *Murray* (2). In a most clearly reasoned judgment that learned Judge says (at p. 470):—"I do not quite go with the inference drawn from Lord Romilly's observation in *Hewitt* v. *Kaye* (1) where he speaks of an I O U as in the same class as a promissory note. Such a document is not a security for money in the sense in which a bond, or a bill, or a note is. It is merely evidence of a debt." Had the delivery of evidence of a debt been sufficient, the bank book delivered by the deceased in that case would have been held by the Master of the Rolls to have constituted a valid *donatio mortis causa*. Mr. Ball has argued that *M'Gonnell* v. *Murray* (2) is overruled by *Duffin* v. *Duffin* (3); but I can see nothing there to shake the authority of the Irish case.

Text-books of course cannot be cited as authorities, but they are of importance as showing the opinion of the profession. In Byles on Bills, 15th Edition, at p. 201, the opinion is given that

(1) L. R. 6 Eq. 198. (2) I. R. 3 Eq. 460. (3) 44 Ch. D. 76.

an I O U is not capable of forming the subject of a *donatio mortis causa.*

Upon the whole I have arrived at the conclusion, upon the narrow question presented to us, that a valid *donatio mortis causa* of the debt due in this case to the deceased could not be effected by the delivery of the I O U given by the debtor to the deceased.

The decision of the Vice-Chancellor must, therefore, be reversed.

FITZ GIBBON, L.J.:—

Before dealing with the law, I desire to state precisely what the debt was in respect of which the I O U was given. I read from the evidence of the debtor himself:—"I asked my wife for my cheque-book, to pay the interest on my loan in the bank. Mrs. Smith asked me what *per cent.* I paid. I said 4 *per cent.* She asked me if I would give her 4 *per cent.* on £100 that she had on deposit in the Royal Bank. I said I would. She got the deposit receipt and handed it to me; she signed it. I gave her an I O U. She said she did not want it; but I insisted on giving it. I took the deposit receipt to the bank and cashed it." Further on, he says that he paid interest on the loan so obtained up to December, 1890. The *chose in action*, therefore, which is the subject-matter of this appeal, consists of a debt of £100, bearing interest at 4 per cent. which was evidenced as to part—viz. the principal—by a document now lost or destroyed, stated to have contained these words only—"I O U one hundred pounds," and to have been signed by the debtor; and evidenced as to the remainder of the debt—viz. the interest due and accruing—by the debtor's parol admission, and by payment of interest at the rate mentioned by him on one or two occasions. The remedy of the creditor for recovery of this debt was an action for money forborne at interest. This action must have been sustained by oral evidence of the parol contract corroborated by actual payment. The I O U would have corroborated the claim for the principal, but it was under the parol contract alone that the interest could have been recovered, and the I O U therefore was only imperfect evidence of the debtor's indebtedness; it did not

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disclose—it essentially differed from—the real obligation; it was a mere memorandum, not indicating the whole or the real nature of the debt, given by the debtor after the creation of the debt, and given without being required by the creditor, who had expressly stated that the debtor's word was enough for her. It is the essence of a *donatio mortis causa* that there shall be a tradition of some specific tangible thing—the property itself, or something representing it. Here there was no possibility of delivering the debt or chose in action, which rested in a parol contract; and the only thing which was capable of delivery, the I O U, did not truly or fully represent the debt. If handing over the I O U in this case was a good *donatio mortis causa* capable of passing the whole debt, I can see no reason why any debt created by parol could not be similarly assigned by handing over any piece of paper which happened to evidence part of it. This I O U was not the thing by which the debt was what it was—an interest-bearing debt. On the contrary, the I O U alone was mere evidence of an account stated, on which interest would not be payable.

Moore v. *Darton* (1) is a frontier case, beyond which the Court cannot go. The document of which the delivery was there held to constitute a good *donatio mortis causa* of the debt was in the following form:—"Received the 22nd of October, 1843, of Miss Darton, five hundred pounds, to bear interest at 4 per cent. per annum, but not to be withdrawn at less than six months notice. William Moore." It was therefore a paper which evidenced not only the principal debt of £500, but also the whole contract of loan under which this debt was to bear interest, and was not to be called in for a stated time. This contract altered the rights that would ordinarily flow from a simple loan of £500 by one person to another, and the entire contract was expressed in and evidenced by the document, which was handed over with the intention of thereby passing all that the document represented.

The Vice-Chancellor—Sir J. L. Knight-Bruce—said, "It is true that the delivery of a bond is not the delivery of the mere evidence of a debt, for it is the delivery of that without which the debt would not have been a specialty." Again, he says, "The

(1) 4 De G. & Sm. 517.

delivery of an instrument creating a specialty debt, without which it would not be a specialty debt, as in the case of a bond, would be sufficient for the purpose of a *donatio mortis causa*; and so Lord Eldon decided as to a mortgage. That, however, I agree does not go to the length of deciding that the delivery of *the mere evidence of a debt* would be sufficient. In this case there was *something more.* The document here has been called a receipt, and is a receipt in a sense, but it is not a receipt in the ordinary acceptation of that term. . . . The debt was a debt carrying interest. A mere debt of £500 would have arisen from a loan, without any writing. But it would not have been a debt carrying interest, without *a contract to that effect beyond the advance.* That particular contract, I agree, might have been entered into without writing: but, as it was created by writing, proof of the writing, if possible, was essential to recovery upon the contract. *This writing was therefore in a sense essential to the proof of the contract;* and it is this writing which was, in substance, delivered *mortis causa* to the person owing the money." This being the reasoning by which the learned Judge was enabled to hold that there was a *donatio mortis causa* of the debt in that case, his *ratio decidendi* being that the document delivered was "essential to the proof of the contract," *Moore* v. *Darton* (1) becomes an authority *against* holding that the tradition of an I O U has the same effect when it is, at best, the mere evidence of a debt, and, *a fortiori*, when, as here, it does not evidence at all the real contract, which was a contract to forbear at interest the principal sum in respect of which it was given.

I am, therefore, of opinion that so much of the Vice-Chancellor's order as declares this to have been a good *donatio mortis causa* must be discharged.

WALKER, L. J. :—

I also think that the appeal must succeed. The contention in favour of the *donatio mortis causa* goes far beyond anything that has been decided, and if it succeeded it would seem to me that it should be held that a man's balance at his banker's could be transferred by the delivery of his pass-book, or a tradesman's debts by

(1) 4 De G. & Sm. 517.

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the delivery of his pass-books with his customers when they had written acknowledging the receipt of goods invoiced.

I am not disposed to extend the doctrine to additional loose dealings with the property of people *in extremis*.

It is not sufficient to have evidence of intention: that exists in all cases where an attempted gift is made. A case of a bond stands on a special footing, for it is a specialty debt, and you prove that by producing the bond. The delivery of the thing must carry with it some property, or the delivery must be of some writing which contains special terms or conditions attaching to the debt which it proves, and which must be carried out and proved in seeking its enforcement. It is on this latter principle that cases like *Moore* v. *Darton* (1) and *Cassidy* v. *Belfast Bank* (2) can alone be and are supported. The observations in *Moore* v. *Darton* (1) as to the writing being essential for proof eminently apply to a deposit receipt. Now inasmuch as in such cases the Judges who decided them took special pains to rest them on the peculiar incidents attaching to the special contract, they cannot be treated as authorities for the validity of a gift of that which is merely evidence of the existence of a simple contract debt in its baldest form—a simple admission by A that he owes money to B, with this additional infirmity, when you contrast it with *Moore* v. *Darton* (1), that the I O U here leaves out a material term of the parol agreement, viz. all about the interest.

The only shadow of authority is the statement in Lord Romilly's judgment in *Hewitt* v. *Kaye* (3), when he classes an I O U in the category of choses in action, and therefore assumes that the instrument confers upon the donee "all the rights to the chose in action arising out of the instrument." An I O U is not a chose in action, though the debt of which it is evidence is.

If it were the law that anything which the donor in intention treats as the *indicia* of title to the subject-matter transferred is sufficient to make the gift good, a number of cases decided by Judges of great eminence could not be supported—such as *Ward* v. *Turner* (4), applicable to the receipts for the purchase-money of

(1) 4 De G. & Sm. 517.
(2) 22 L. R. Ir. 68.
(3) L. R. 6 Eq. 198.
(4) 2 Ves. Sen. 431.

the South Sea annuities—*Moore* v. *Moore* (1), treating of the scrip of railway stock; *M'Gonnell* v. *Murray* (2), where the savings bank book was dealt with; and a case, which has not been referred to, of *Beak's Estate* (3), where a man delivered over his cheque on his bankers, and also his pass-book with his bankers, which was contended to be equivalent to a gift of a deposit note of the bankers. In this last mentioned case Sir James Bacon decided that there was no valid gift. He says:—"I think this case is covered entirely by authority. The only circumstance that seemed at first sight to distinguish it was the delivery of the banker's acknowledgment of debt. But the difference between a deposit note, which was the docket delivered over in *Amis* v. *Witt* (4) and a pass-book is enormous. The pass-book is not in any degree in the nature of a bond or agreement."

I cannot distinguish such a case in principle from the acknowledgment contained in an I O U. Does not a bank acknowledge by the pass-book the admission of the balance on the account as a debt due to its customer? There are observations at the close of the Vice-Chancellor's judgment in the present case which show that he was basing his judgment upon some views which cannot be supported and were not here contended by Mr. Gordon to be accurate, and I think this largely accounts for the conclusion he came to.

The particular point does not appear to have been argued before him. If he were right, that an I O U is a chose in action, and that the right to sue on it vests by the delivery of the instrument, since the Judicature Act, there would be strong grounds for supporting his conclusions, but I am not able to concur in his premises.

HOLMES, L. J.:—

I agree with the other members of the Court in thinking that the doctrine of *donatio mortis causa* is not to be extended.

Authority, so far as it has gone, ought to be loyally followed; but it is because the judgment of the Vice-Chancellor has pushed

(1) L. R. 18 Eq. 474.
(2) L. R. 3 Eq. 460.
(3) L. R. 13 Eq. 491.
(4) 33 Beav. 619.

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the principle to a point which it has not yet reached that I feel myself unable to accept it.

Fitz Gibbon, L.J., has called attention to the circumstances out of which arose the debt to Mrs. Smith by her son-in-law. It was the ordinary case of a loan from the one to the other of £100; and when the latter received the money, the chose in action came into existence. If it were not for the accidental circumstance that Mr. Lee of his own account handed to his mother-in-law a paper on which he had written "I O U £100," there could have been no *donatio* of the debt, as there would have existed nothing of which delivery could have been made. Can this document be so taken to represent the chose in action as to make it possible to transfer the debt on the death of the creditor by her handing over the paper in contemplation of that event?

There are debts to which certain legal incidents attach, such as debts of record, specialty debts, or debts negotiable by the law-merchant. These debts cannot exist without a written instrument—a record, a bond, a deed, a promissory note, or a bill of exchange. It is natural to hold that if the law recognises the doctrine of *donatio mortis causa* at all, it ought to be applied in this class of cases in which there can be delivery of a document that was not only a token of the chose in action, but is its very foundation.

There are also simple contract debts to which the parties have by memorandum in writing attached special condition as to bearing interest, the mode of payment, and the steps to be taken before payment can be enforced; in such cases the document may be regarded as essential evidence to establish the debt, inasmuch as it contains the terms of the contract which could not otherwise be proved; and it is possible to hold without an infringement of the principle governing this branch of the law that by the delivery of such a document in anticipation of death there may be a transfer of the debt to take effect upon death. At least this seems to be the reasoning of Knight Bruce, V.-C., in *Moore* v. *Darton* (1); and it is probably the foundation of the decisions that recognize a *donatio mortis causa* of a banker's deposit receipt, which generally contains

(1) 4 De G. & Sm. 517.

a condition that the money will only be paid on production of the document. But the I O U given by Mr. Lee is wholly different in character. No doubt, if the debt were denied, it would be valuable evidence of it; but it is not necessary evidence or the only evidence, and it does not even contain the stipulation as to interest. It is no more than a banker's pass-book written up to date, or a letter acknowledging the receipt of goods and the invoice of their price. No case has held that there can be a *donatio mortis causa* by the delivery of such documents. *Hewitt* v. *Kaye* (1) does not touch the matter in its result, and I regard the reference by Lord Romilly to an I O U in his judgment as having fallen from him *per incuriam*. It was dissented from in *M'Gonnell* v. *Murray* (2) in the following year; and has never been acted on before the present case.

Solicitor for the plaintiff: *Sutton.*
Solicitor for the defendant: *Shannon.*

G. Y. D.

(1) L. R. 6. Eq. 198. (2) I. R. 3 Eq. 460.

M. R.
1898.

Jan. 19.
Feb. 2, 23.

Appeal.
June 20, 21, 22, 28.

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(1897. No. 312.)

Dower—Marriage settlement—Annuity out of leaseholds to intended wife "for the purpose of making a provision for her"—Right to dower and thirds not barred—Merger—Dower of equitable estates—3 & 4 Wm. 4, c. 105, s. 2—Estate pur autre vie *and estate in fee—Contingent remainder interposed.*

By a settlement executed by a widower on the occasion of his second marriage leaseholds were conveyed by him to trustees on trust to pay to the intended wife, after his death, an annuity of £500. The settlement recited an agreement that the lands were to be conveyed to the trustees upon the trusts (amongst others) for the purpose of making a provision for the intended wife by securing to her a life annuity of £500 :—

Held, that the settlement was no bar to the widow's claim to dower or thirds. *Vizod* v. *Londen* (Wm. Kelynge, 17) explained.

By a Landed Estates Court conveyance of the 14th July, 1864, perpetual yearly rents were granted to X, his heirs and assigns in trust during the life of A to permit C (the purchaser) and his assigns to receive the rents for his and their own use, and after the death of A to the use that B, the wife of A, should, if she survived him, receive a jointure of £250 a year, and, subject thereto, to the use of the first and other sons of A and B in tail male, and in default of such issue male to the use of the first and other daughters of A and B, and their heirs as tenants in common, and in default of such issue then to the use of C, his heirs and assigns for ever, subject to certain charges mentioned in the conveyance.

On the 27th June, 1882, C mortgaged the perpetual yearly rents to an insurance company. On the 8th October, 1886, C died intestate, leaving D, a widow, and E and F, daughters of a deceased son by a former marriage, his co-heiresses at law. A died in 1891, without issue, leaving B surviving. In 1897 D brought an action against E and F to establish *inter alia* her right to dower :—

Held, that, notwithstanding the interposition of the contingent estate to the issue of A and B, the estate *pur autre vie* given to C by the Landed Estates Court conveyance merged in, or united with, the estate in fee in remainder given to him by the same conveyance, and that D was entitled to dower. *In re Mitchell ; Moore* v. *Moore* ([1892] 2 Ch. 87), considered.

Cordal's Case (Cro. Eliz. 315) questioned.

TRIAL OF ACTION.

This action was brought by the plaintiff Isabell Lemon, the widow and administratrix of Graham Lemon, deceased, to have his personal estate administered, and for a declaration that the plaintiff was entitled to dower out of the lands to which Graham Lemon was entitled for an estate of inheritance at his death, and also that, if necessary, his real estate should be administered, and all necessary accounts and inquiries should be taken and made.

Graham Lemon died on October 8, 1886, intestate. He was twice married. The defendants were Mary Cecilia Mark, wife of James Mark, and Annie Graham Thompson, wife of John R. Thompson, the granddaughters and co-heiresses-at-law of Graham Lemon, daughters of his eldest son John Brady Lemon, who predeceased his father. The next-of-kin of Graham Lemon living at his death were the defendants and Graham Lemon, jun., Thomas Owens Lemon, Grattan Guinness Lemon, and William Henry Guinness Lemon, sons of Graham Lemon, and three children of a deceased daughter, Mary Eliza Lyons, otherwise Lemon, wife of the Rev. James Lyons. Grattan Guinness Lemon died on May 28, 1894, leaving him surviving a widow, Maud Lemon, and an infant daughter. The plaintiff was the second wife of Graham Lemon. There was no issue of the marriage.

A settlement was executed on the occasion of the said marriage, dated April 29, 1884, made between Graham Lemon of the first part, the plaintiff, by her then name of Isabell Ross, of the second part, and David Ross and the Rev. James Lyons, thereinafter called "the said trustees," of the third part. It recited an agreement that Graham Lemon should convey to the said trustees certain premises situate in Stephen's-green and South King-street in the city of Dublin, held by Graham Lemon under a lease of the 19th August, 1863, for a term of 999 years, subject to the yearly rent of £600, but producing a gross rent of £1300 a-year, to hold upon the trusts thereinafter declared, and amongst others for the purpose of making a provision for the said Isabell Ross by securing to her the payment of an annuity or yearly sum of £500 for the term of her natural life. The deed then conveyed the premises to the trustees upon trust, after payment of the headrent, to permit Graham Lemon to receive the rents and profits during

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his life, and after his death in case the said Isabell Ross should survive him to pay to her and her assigns during her life the yearly rentcharge or annual sum of £500 clear above all outgoings, payable half-yearly, and with power to her and her assigns to enforce payment thereof by distress or otherwise as in cases of distress for rent in arrear. Subject as aforesaid, the premises were settled on the usual trusts for the issue of the marriage, and in default of issue in trust for the executors, administrators, and assigns of Graham Lemon.

Graham Lemon at the time of his death was possessed of other leasehold property in the city of Dublin, and was also entitled under and by virtue of the limitations contained in a Landed Estates Court conveyance of July 12, 1864, to certain perpetual yearly rents issuing out of premises in Grafton-street and South King-street, in the city of Dublin. These last-mentioned premises (as well as some of the leasehold property) were subject to incumbrances, including a mortgage to the Caledonian Insurance Company for £15,500 created by an indenture dated June 27, 1882, from Graham Lemon to the said Company. After his death the Company obtained an order of the Land Judge of the Chancery Division for sale of the premises comprised in their mortgage, and a receiver was appointed, who applied the rents and profits pursuant to the orders of the Land Judge until the death of the receiver, which took place in February, 1892. The defendants at the date of the death of Graham Lemon were infants and unmarried, and did not attain age till the years 1890 and 1891, respectively. On December 9, 1886, the plaintiff obtained letters of administration of the personal estate and effects of Graham Lemon, and paid his debts (other than the said mortgage debt) and administered his personal estate and effects. Thomas Owens Lemon, the uncle of the defendants, and who had been their guardian, was appointed by deed, dated the 6th April, 1892, receiver over the said premises, to which deed the defendants and the said Company were parties. The deed provided that the surplus rents and profits (if any) were to be paid by the said Thomas Owens Lemon to the defendants.

By deed dated the 28th June, 1893, made between the plaintiff of the first part, the defendants by their then names of Mary

Cecilia Lemon, and Annie Graham Lemon, and the other next-of-kin of the said Graham Lemon, already mentioned, of the second part, and the said Rev. James Lyons of the third part, the plaintiff as such administratrix, and in her personal capacity as widow of the said Graham Lemon, assigned to the parties of the second part certain leasehold premises therein mentioned, which together with certain shares in Graham Lemon and Company, Limited, and in the Clontarf Baths Company, Limited, mentioned in the schedule thereto, and transferred to the said parties of the second part by transfer deeds of even date, were stated to form the outstanding personal estate of the said Graham Lemon, to hold as tenants in common in the shares and proportions therein mentioned. By deed of even date therewith made between the defendants and the other next-of-kin already mentioned of the first part, the said Rev. James Lyons of the second part, and the plaintiff of the third part, the said parties of the first part released the said plaintiff from all claims and demands in respect of the personal estate and effects of the said Graham Lemon.

On the 6th April, 1897, the plaintiff commenced this action. The statement of claim alleged that Graham Lemon was entitled at his death to an estate of inheritance in divers lands and premises in Grafton-street and South King-street in the city of Dublin, and that the defendants had been, during their minorities by their guardian, and in their own persons since they attained age, in receipt of the rents and profits of the said lands, and that the settlement of the 29th April, 1884, did not bar the plaintiff's right to dower or thirds.

It also alleged that Graham Lemon was entitled to certain leasehold premises in South King-street, Grafton-street, and Tangier-lane in the city of Dublin, held for long terms of years; that at the date of his death it was believed that these premises were held in fee, and that the defendants as his co-heiresses-at-law had entered into receipt of the rents and profits thereof, and that the plaintiff had only recently ascertained that these premises were held for terms of years.

The defendants by their statement of defence denied that Graham Lemon was entitled at his death to an estate of inheritance in possession in the lands mentioned in the statement of claim,

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and further submitted that the annuity given by the settlement was in lieu of dower and thirds. The defendants relied on the deed of 1893 as showing that the plaintiff gave up her share (if any) of the personal estate of Graham Lemon, and pleaded waiver and acquiescence.

The action came on for hearing on January 19, 1898.

Matheson, Q.C., and *Gerald Fitz Gibbon*, for the plaintiff:—

The settlement does not bar the plaintiff's right to dower. By 27 Hen. 8, a legal jointure barred dower at law. Six requisites were required for a legal jointure: Co. Litt., 366. In equity dower can be barred by the wife's agreement, or by estoppel: by 3 & 4 Wm. 4, c. 105, by declaration of the husband's intent to bar dower—(*a*) in deed, sect. 6; (*b*) in will, sect. 7. If dower is barred by the present settlement, it must be so—(*a*) by agreement, *i.e.* by intent of both parties; (*b*) or by declared intent of the husband; *quâcunque viâ*, the intent of the husband must be there. The intent must be clear, for the right is clear: *Birmingham* v. *Kirwan* (1); *Tinney* v. *Tinney* (2). It cannot be spelt out of ambiguous words: *Hamilton* v. *Jackson* (3); *Cody* v. *Cody* (4). There are no words here sufficient to show such an intention: *Cody* v. *Cody* (4); *O'Rorke* v. *O'Rorke* (5); *Willis* v. *Willis* (6). In that case the same words "for a provision" were held no bar of free-bench, which was less readily barred than dower, because the husband could bar it himself by surrender of copyholds in his lifetime; and title was only consummated on death of the husband. But since the Dower Act dower is in exactly the same position as free-bench.

The settlement *à fortiori* does not bar the plaintiff's right to her share of personalty; there is no contract to that effect, express or implied: *Creswell* v. *Byron* (7).

If the settlement does not bar the plaintiff's right to dower and thirds, nothing has happened since to preclude the plaintiff enforcing her right now.

(1) 2 Sch. & L. 444.
(2) 3 Atk. 8.
(3) 2 J. & Lat. 295.
(4) 5 L. R. Ir. 620.
(5) 17 L. R. Ir. 133.
(6) 34 Beav. 340.
(7) 3 B. C. C. 362.

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The Right Hon. The Mac Dermot, Q.C., and *Gordon, Q.C.* (*Lawson*, with them), for the defendants :—

The provision made by the settlement was clearly intended as a bar to the wife's right to anything further. It is not necessary that the word "jointure" should occur, nor that the provision should be made out of real estate. Any provision is sufficient. *O'Rorke* v. *O'Rorke* (1) is in our favour.

[They also referred to *Dyke* v. *Rendall* (2); *Vizard* v. *Longdale*, cited in *Walker* v. *Walker* (3); *Tinney* v. *Tinney* (4); *Earl of Buckinghamshire* v. *Drury* (5); *Killen* v. *Campbell* (6); *Birmingham* v. *Kirwan* (7); *Re Burgess* (8); *Thompson* v. *Watts* (9); *Sambourne* v. *Barry* (10); *Coyne* v. *Duigan* (11).]

The acquiescence of the plaintiff shows that she took the same view of the settlement as the defendants did, namely that she was not entitled to anything on her husband's death; besides she was aware that the property of which she now demands a share was leasehold, and she has got a release from the next-of-kin, and cannot now get an order for administration.

Feb. 2.

THE MASTER OF THE ROLLS :—

The main question in this case is as to the effect of the marriage settlement of April 29th, 1884, upon the plaintiff's claim to dower. It is not necessary for me now to read much of the settlement, which was made by the late Graham Lemon on his marriage with the plaintiff, then Isabell Ross, who was his second wife. It was a settlement of personal estate only, namely, of leasehold property in Stephen's-green, Dublin, held by Graham Lemon for a term of 999 years, subject to a rent of £600 a-year, but stated to produce a gross rent of £1300 a-year, thus leaving a large profit rent. The settlement, after reciting these matters, and the agreement for the marriage, recites that it was agreed that the said Graham Lemon should, with the consent of the said

(1) 17 L. R. Ir. 133.
(2) 2 De G. M. & G. 209.
(3) 1 Ves. Sen. 54.
(4) 3 Atk. 8.
(5) 3 Bro. P. C. 92.
(6) 10 Ir. Eq. R. 461.
(7) 2 Sch. & L. 444.
(8) 11 Ir. Ch. R. 164.
(9) 2 J. & H. 291.
(10) Ir. R. 6 Eq. 28.
(11) [1894] 1 Ir. R. 138

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Isabell Ross convey to the trustees the premises comprised in the said lease upon the trusts thereinafter declared, and amongst others for the purpose of making a provision for the said Isabell Ross, securing to her the payment of an annuity or yearly sum of £500 for the term of her natural life. The operative part of the deed then conveys the premises to the trustees, upon trust for Graham Lemon until the marriage, and after the solemnization thereof in trust, after payment of head rent and other outgoings and sums expended in repairs, to permit Graham Lemon to receive the rents and profits during his life, and from and after his death, "in case the said Isabell Ross shall survive him, in trust to pay to the said Isabell Ross and her assigns for the term of her natural life the yearly rentcharge, or annual sum of £500, clear and above all outgoings whatsoever, same to be payable half-yearly on every 1st day of May and 1st day of November." There is a power to enforce payment by distress or otherwise, as in cases of distresses for rent in arrear, and subject thereto the trustees are to hold the premises on the usual trusts for the children of the marriage; and in default of issue, which event happened, in trust for Graham Lemon absolutely. The deed does not describe the annuity as a jointure.

I am not aware of any case, if it be not *Vizard* v. *Longdale* (1), in which a provision made for a wife out of personal estate has been held to bar her dower without express words, unless the provision is described as a jointure. A jointure, properly so called, was a common law bar to dower, and any provision made and accepted as a jointure, though not strictly such, has been held to have the same effect. Of such cases *Dyke* v. *Rendall* (2) is an example. And the same rule would apply wherever it appears that the provision in the settlement is to be the only provision by the husband for the surviving wife. Cases where the provision is out of real estate, to which dower would otherwise have attached, also stand on a different footing, for it will not lightly be presumed that the wife was intended to have two separate interests in the same hereditaments, and that which is provided for by express contract will generally exclude the other.

(1) 1 Ves. Sen. 54. (2) 2 De G. M. & G. 209.

Dyke v. *Rendall* was a case of personal estate only. The settlement there contained a recital that in consideration of the intended marriage, *and for providing a competent jointure and provision of maintenance* for the wife in case she should survive her intended husband, and for securing a provision for their issue, the father of the husband had paid him £3000, and the husband had given a bond for payment of £2000 six months after the marriage, to be settled on trusts for the benefit of himself, his wife, and the issue of the marriage. The husband during the marriage bought certain lands, which he subsequently sold to a purchaser, from whose devisees the defendant purchased, with notice of the settlement. The husband died without satisfying the bond. The wife filed a bill, claiming dower out of lands so sold. It was held that the settlement was a bar to the claim for dower. The Lord Chancellor there says:—"In the case of *Vizard* v. *Longdale*, cited in *Tinney* v. *Tinney* (1) there was no statement that the provision was intended for the jointure of the wife, whereas in the present case there is an express recital that the sums paid and secured were for a 'competent jointure and provision of maintenance.' I think it very clear, therefore, that the words used in the settlement before me are in themselves sufficient to operate in this Court in bar of dower."

In *Killen* v. *Campbell* (2) the settlement contained a recital that a sum of £400, the wife's fortune, was to be paid over to the husband, in consideration of his father securing to her, in the event of her surviving her husband, an annuity or *jointure* of £40 a-year for her life, and the husband's father then conveyed certain leaseholds to the trustees to pay to her upon the death of her husband an annuity or clear yearly *jointure* of £40. The settlement then, in order to secure any deficiency in the said jointure or annuity, contained a covenant by the husband, charging all the real and personal estate of which he should be seised or possessed, with payment of a full sum of £400, or the said annuity of £40. The husband died possessed of real estate, and the question was whether, notwithstanding the provisions of the settlement, the wife was entitled to dower. The Lords Commis-

(1) 3 Atk. 8. (2) 10 Ir. Eq. R. 461.

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sioners held that the settlement was a bar to dower. The use of the word "jointure" is relied on in the judgments, but the decision went on this, that it would be making a covenant for the parties, and manifestly inconsistent, to hold that the real estate should be charged with the annuity, and yet that the widow should be entitled to one-third of the same lands by way of dower.

Sir Edward Sugden's decision in *Hamilton* v. *Jackson* (1), which was cited in *Killen* v. *Campbell* (2), is referable also to the principle to which I have adverted. There marriage articles contained a covenant that if the husband should die in the wife's lifetime without leaving issue she should be entitled to one-half of whatever real or personal estate he should die seised or possessed of. There was no provision in the event of his dying leaving issue. The Court held that the plain intention of the articles was to bar the widow of dower out of the remaining half of her husband's estate. But *Vizard* v. *Longdale* would seem to have been a case of a different sort from either of these two classes. It does not appear to be reported, but is referred to in *Walker* v. *Walker* (3), in 1747, as an authority by Lord Hardwicke. Lord Hardwicke says:—"There are several cases where by the provision of the husband a wife may be barred of dower, where the common law would not bar her; as out of personal estate, if so framed as to import a jointure, whether expressed or no; which the court does by way of enforcing the agreement of the parties, and to prevent double satisfaction. It was so decreed by Lord Somers (4), which indeed was reversed by the Lords; for that in a bare devise of land, without more, the court will not intend it to be in bar of dower. But in a late case before Lord King of *Vizard* v. *Longdale*, on a bond before marriage for the wife's livelihood and maintenance, it was held a satisfaction, though the word *jointure* was not used, the reason of which extends to the present case, which is very strong to bar her." And further on Lord Hardwicke says:—"What I chiefly lay stress upon is, that for her *jointure* alone would do,

(1) 8 Ir. Eq. R. 195.
(2) 10 Ir. Eq. R. 461.
(3) 1 Ves. Sen. 54.
(4) 2 Ver. 365.

but not on that singly. The words *provision if she survive* mean the same as in *Vizard* v. *Longdale*, and the word *some* makes no difference; for it is not said *some part*."

It is also referred to in *Tinney* v. *Tinney* (1) by Lord Hardwicke in 1743, and apparently disapproved. Lord Hardwicke says:—"In the case of *Vizard* v. *Longdale* Sir Joseph Jekyll held the words in a bond to secure a sum of money for her livelihood and maintenance was no bar of dower. Lord Chancellor King was of opinion that it was a bar of dower, and said it was within the equity of the statute of Henry 7 of Jointures, and, therefore, reversed Sir Joseph Jekyll's decree."

Vizard v. *Longdale* is mentioned in *Couch* v. *Stratton* (2), decided in 1799 by Lord Loughborough, not cited during the argument. There the husband pursuant to an agreement to settle £6000 upon the trusts thereinafter declared, in consideration of the marriage and the portion he would receive, and *for making some provision for the wife* and her issue besides the provision made by an indenture of even date therewith, covenanted that his executors would within three months after his death pay to the trustees the sum of £6000, with interest from the day of his death; in case his wife should survive him, having no issue, that the trustees should pay £1500 of the £6000, and the interest thereof to his wife for her own use; and as to the remainder of the £6000 to pay the interest thereof to her during her life, and after her death to assign the same to the husband's executors or to such persons as he should appoint. There was no issue of the marriage. The case came before the Court in an administration suit brought against the widow by the the next-of-kin and co-heiresses-at-law of the husband, and claiming a declaration that the widow's claim to dower was barred.

The Lord Chancellor says:—"With regard to the other point here is nothing carrying with it the least implication with respect to dower: *Vizard* v. *Longdale* does not, I believe, stand high in point of authority. Not a great while before that case *Lawrence* v. *Lawrence* (3) occurred; which was so much contested, running upon the point, whether this Court could hold anything

(1) 3 Atk. 8. (2) 4 Ves. 391. (3) 1 Eq. Ca. Ab. 218.

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a bar which is not a bar by the statute." Lord Loughborough evidently did not think it a binding authority. *The Earl of Buckingham* v. *Drury* (1), referred to as *Drury* v. *Drury* in *Carruthers* v. *Carruthers* (2) turned altogether on the question of the infancy of the wife. The settlement contained as full and express a bar of dower, &c., in consideration of a "jointure" as it is possible to conceive.

In *Willis* v. *Willis* (3) there was a settlement of a copyhold interest, "*in order to make some provision for the wife* in case she should survive" upon the husband for life, with remainder to the wife for life. Lord Romilly held that it was no bar to the right to free-bench out of other copyholds of which the husband died possessed. Lord Romilly there says:—"It is argued upon the authority of many cases to which I shall presently refer, that such a covenant in a deed will bar dower; and it may, I think, be stated generally that the settlement of a jointure made before marriage upon the wife will bar the wife's dower: *Garthshore* v. *Chalie* (4), *Hamilton* v. *Jackson* (5), and many other cases. Many cases were cited for the purpose of showing that where the provision was stated to be for the purpose of providing for the wife's livelihood and maintenance, it would bar her dower. But in all these cases it is an inference to be drawn from the settlement, and the provision thereby made for the wife; and in considering this inference, it is important to bear in mind the distinction which arises between dower and free-bench. If the right to dower once attached to the freehold, the husband could not sell the land, but this is not so in copyholds. The wife has no title to free-bench by reason of her marriage, as she has to dower; she is only entitled to her free-bench in case the husband dies seised of the copyhold. So regarding it, it is important to observe that no intention that the wife's right to free-bench should be barred is expressed in the settlement, and I am of opinion that no such intention can be properly deduced by implication from the settlement." Lord Romilly then refers to the distinction

(1) 3 Bro. P. C. 492.
(2) 4 Br. C. C. 512.
(3) 34 Beav. 340.
(4) 10 Ves. 1.
(5) 2 J. & Lat. 295.

between freehold and copyhold and to Lord Redesdale's decision in *Birmingham* v. *Kirwan* (1).

Two cases in this Court were also referred to, namely, *Cody* v. *Cody* (2) and *O'Rorke* v. *O'Rorke* (3). In *Cody* v. *Cody* (2), the wife's father settled an annuity of £40 a-year on her, and the husband by the same deed settled a like annuity of £40 a-year charged on certain house property held in fee-farm, and payable on his death to her for life, and after her death to the issue if any of the marriage, as the husband or wife or the survivor should appoint. There was no issue of the marriage, but there were children of a former marriage. The husband died possessed of other house property also held in fee-farm. A suit was brought to administer his estate, and in it the question of the widow's right to dower arose. Sir Edward Sullivan held that her right to dower was not barred even as to the lands on which the annuity was charged; he says: "The marriage settlement provided an annuity of £40 a-year for the intended wife, pound for pound for the annuity granted by her father, as her fortune. In the settlement the annuity is not called *a jointure, nor is it given in lieu of dower or as a provision for her maintenance.* It was contended that the annuity was in bar of dower, because it is inconsistent that dower and the annuity should both be payable out of the same lands, and *Killen* v. *Campbell* (4) was cited in support of that argument. In that case a terminable interest was conveyed to trustees to secure the wife an annuity *or jointure* of £40, and the husband covenanted that if these properties should fail or be deficient, all the real and personal estate he should die seised or possessed of should be vested in trustees to raise £400, or an annuity of £40 for the wife. The word 'jointure' has always been held to be an important word in arriving at the intention of the parties, and the covenant in that case was inconsistent with the wife having a right both to her annuity and her dower. I am of opinion that this being the bare grant of an annuity for the wife surviving, it does not bar her dower even out of the lands charged with the annuity." In *O'Rorke* v. *O'Rorke* (3) leasehold property was assigned to trustees in trust for the husband for life

(1) 2 Sch. & Lef. 444.
(2) 5 L. R. Ir. 620.
(3) 17 L. R. Ir. 123.
(4) 10 Ir. Eq. R. 461.

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or until he should become bankrupt or insolvent, and in that event in trust to pay the rents to the wife for life for her separate use for the maintenance of herself and her children: the settlement then recited that "*in order to make a reasonable and more adequate provision*" for the wife and issue of the marriage, the husband had executed a bond to the trustees for £1000, and the trusts of the bond were, in the event of the husband becoming embarrassed, or that there should arise some good reason therefor, so as to render a sale consistent with, and in aid of the trusts of the settlement for securing a provision for the wife and issue of the marriage, to raise the amount of the bond out of the property of the husband, and invest the amount and pay the interest to the wife for life. The husband died intestate seised of fee-simple property. The plaintiff claimed dower out of these lands. I was of opinion that the settlement conclusively showed that the provision for the wife was not meant to exclude such rights as the law would give her against her husband's real estate in the event (which happened) of his dying solvent, and I held that she was entitled to dower. I had occasion in that case to refer to the authorities cited in argument from *Vizard* v. *Longdale* (1), to *Cody* v. *Cody* (2), though in the view I formed of the meaning of the settlement, it was not necessary to enter into an elaborate discussion of them.

The result of the authorities seems to be as follows: As a general rule, the mere fact of the husband making by antenuptial settlement a provision for the wife in the event of her surviving, is not enough to deprive her of dower or of the share of personal estate which the Statute of Distributions gives her. Almost every marriage settlement makes such a provision. In the absence of proof of a different intent, such provision is meant to secure something for the wife in any event, and not to exclude her from whatever other rights the law confers upon her. In the present case it was sought to get at the contrary intent by the surrounding circumstances: the fact of the plaintiff being a second wife, while there is a large family by a former marriage; the amount of the provision itself (£500 per annum); the fact of her having divided the residuary personalty so far as it was known in 1893,

(1) 1 Ves. Sen. 54. (2) 5 L. R. Ir. 625.

without retaining her third, &c. In my opinion, the law does not allow me to decide the case on such reasonings, and the rights depend upon the settlement itself, and the construction of the language used in it. If it could be construed by the surrounding circumstances, two identical instruments might have to be differently construed. Take the case which sometimes happens of two sisters married on the same day, the settlements being prepared by the same solicitor in the same words. One husband is a rich man, the other a poor man; one a bachelor, the other a widower. Is the one instrument to bar dower, and the other not? And what is the measure of the relative proportions of the settlement provisions and of the unsettled fortune of the husband which will exclude dower?

As to the deeds of 1893, they do not touch the question of dower. I see nothing in them to prevent Mrs. Lemon from claiming her rights in respect of any property of her husband not comprised in them when it is discovered, and nothing to show that the marriage settlement was meant by her to be an exclusive provision. It may be doubted whether they are even admissible in evidence for the latter purpose. Express admissions by the wife as to her intention are not admissible against her: see *Tinney* v. *Tinney* (1); and at any rate the deeds do not state that the settlement was to have any such effect. Under the circumstances she might well give up her right against the known assets when they were supposed to be less than the actual assets afterwards turned out to be, without depriving herself of her rights in every possible event. I think, as there are assets not dealt with, the plaintiff is entitled to claim her dower, and her one-third of the personal estate. But difficulties may arise in the course of the administration; there is no doubt that the next-of-kin of Graham Lemon released the plaintiff as administratrix from all claims upon his personal estate. She conveyed to them all the assets which she understood were outstanding. If the defendants are right in their view that the plaintiff is deprived of her share in what I may call the newly discovered assets, they would have no claim to them either, as they have released the plaintiff from all claims on the

(1) 3 Atk. 8.

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assets, and therefore there would be nobody entitled to these assets; but that cannot be. I cannot think, however, that the deeds would have any such effect. Questions would arise—how far they were binding on the parties, when there had been a mutual mistake, or, if they were binding, what effect they would have on the admistration. I think there are undisposed of assets, which should be dealt with. An arrangement might be come to, to prevent the necessity of taking accounts. All that I can now do is to declare the plaintiff entitled to dower, and direct an inquiry as to what estates of inheritance Graham Lemon died seised of. If there is to be an administration of the personal estate, perhaps the parties will agree to limit it to the assets other than those comprised in the deeds of 1893. The case will stand for a fortnight, to see if the parties can arrange to dispense with accounts and inquiries.

Feb. 23.

The case came on for further hearing on this day, to determine the question whether the plaintiff was entitled to dower out of the lands comprised in the Landed Estates Court conveyance of July, 12, 1864. It was admitted by the plaintiff, that the only real estate to which Graham Lemon was entitled to at his death consisted of the lands comprised in this conveyance, and that, therefore, no inquiry was necessary as to what estates of inheritance Graham Lemon died possessed of.

By this conveyance, made pursuant to the Landed Estates Court Act, 1858, the Right Hon. Mountifort Longfield, one of the Judges of that Court, in consideration of the sum of £1325, paid by Graham Lemon to Richard Blair Cullen, the owner in the matter of the estate of Richard Blair Cullen, *ex parte* the said Graham Lemon, petitioner, by the consent, and at the direction of the said Graham Lemon, granted to William Redmond Lemon firstly, the perpetual yearly rents of £5 13*s.* 3*d.*, £39 4*s.* 7*d.*, and £4 14*s.* 6*d.*, created respectively by the indentures of fee-farm grant therein recited, dated respectively May 28, 1857, January 13, 1787, and September, 9, 1851, and all powers and remedies for recovery thereof, and all the estate and interest of the grantor,

under the said deeds respectively; and secondly, the houses and premises in South King-street, and Tangier-lane, in the city of Dublin, specified in the schedule thereto, "to hold unto the said William Redmond Lemon, and his heirs and assigns for ever, in trust for and during the life of the said Richard Blair Cullen, to permit the said Graham Lemon, and his assigns, to receive and take the rents, issues, and profits thereof for his and their own use, and after the decease of the said Richard Blair Cullen, then to the use, intent, and purpose that Jane Cullen, otherwise Dormer, now the wife of the said Richard Blair Cullen, and her assigns, shall and may immediately after the decease of the said Richard Blair Cullen, in case she shall survive him, have, receive, and take, during her natural life, one annuity or yearly rentcharge of £250, issuing and payable out of the said fee-farm rents, tenements, and hereditaments, hereby granted, and payable half-yearly, as therein mentioned, with power of distress in case of non-payment thereof, and from and after the decease of the said Richard Blair Cullen, but subject to the said jointure, to the use and behalf of the first son of the said Richard Blair Cullen on the body of the said Jane Cullen lawfully begotten, and the heirs male of such son lawfully issuing, and in default of such issue to the second, third, fourth, fifth, or sixth, and every other son of the said Richard Blair Cullen on the body of the said Jane Cullen lawfully begotten, severally, successively, and respectively, in remainder one after another as shall happen to be in priority of birth, and seniority of age, and of the several and respective heirs male of his or their body or bodies; and in default of such issue male, then to the use of the first and other daughters of the said Richard Blair Cullen on the body of the said Jane Cullen begotten, in equal shares and proportions, and, in default of such issue as aforesaid, then to the use of the said Graham Lemon, his heirs and assigns for ever." This conveyance was expressly subject to certain charges and annuities.

Richard Blair Cullen died in 1891, without issue. Jane Cullen, his widow, was still alive, and was being paid her annuity of £250 by the receiver.

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Matheson, Q.C., and *Gerald Fitz Gibbon*, for the plaintiff:—

The limitations of the conveyance are peculiar:—William Redmond Lemon was a mere releasee to uses, and he took no estate, nor did Richard Blair Cullen. Graham Lemon took an estate during the life of Richard Blair Cullen, with a contingent remainder to the issue, if any, of Richard Blair Cullen and Jane Cullen, with ultimate remainder, in default of issue of Richard Blair Cullen and Jane Cullen, to Graham Lemon in fee. In other words, Graham Lemon took an estate in fee, subject to be defeated if there was issue of Richard Blair Cullen and Jane Cullen. There was a modified merger of the estate *pur auter vie* with the estate in fee, sufficient to let in a claim for dower. The interposition of the contingent remainder between the two estates did not prevent them uniting, subject to reopening, if the contingent remainder became vested in interest, which it never did. It would be otherwise if the interposed estate had been a vested one. [They referred to 3 Preston on Conveyancing, title "Merger," pp. 83, 108, 112, 113, and 377; Cruise's Digest, p. 472; *Lewis Bowles' Case* (1); *Hooker* v. *Hooker* (2); Gilbert on Uses, p. 305, note; Fearne on Contingent Remainders, by Butler, ii., 345, 349, 351.]

Gordon, Q.C., and *Lawson* (*The Right Hon. The Mac Dermot, Q.C.*, with them), for the defendants:—

No question of this kind is raised on the pleadings. Graham Lemon was never entitled during the life of Richard Blair Cullen to an estate of inheritance in possession; he only had an estate *pur auter vie*, which is an estate of freehold only, and gives no right of dower. There was no merger here: merger is a question of intention, and it was never intended that the effect of the Landed Estates Court conveyance should be to merge forthwith the two distinct estates created by it. [They referred to Perkins' Profitable Book, 15th edition, by Greening, p. 67; 3 & 4 Wm. 4, c. 105, sect. 2; Shelford's Real Property Statutes, p. 344; Judicature (Ireland) Act, 1877, sect. 28 (4).]

Gerald Fitz Gibbon, in reply.

(1) 11 Rep. 79b; Tudor's R.P.C., 4th ed., p. 86. (2) Ca. temp. Hardwicke, 13.

THE MASTER OF THE ROLLS:—

I do not think that it is necessary for me to decide whether William Redmond Lemon was a releasee to uses merely (as I am inclined to think he was), or took the legal estate as trustee, because since the Dower Act a wife is entitled to dower out of the equitable estate of her husband. The Landed Estates Court conveyance, in the first instance, made Graham Lemon tenant for the life of Richard Blair Cullen. It does not appear what Richard Blair Cullen's previous interest was. The words of the *habendum* are as follows:—"To hold the premises firstly and secondly hereby granted unto the said William Redmond Lemon and his heirs and assigns for ever, in trust for and during the life of the said Richard Blair Cullen, to permit the said Graham Lemon and his assigns" (the word "heirs" is omitted) "to receive and take the rents, issues, and profits thereof for his own use, and after the decease of the said Richard Blair Cullen, then to the use that Jane Cullen, the wife of the said Richard Blair Cullen, and her assigns, should immediately after his death, in case she should survive him, receive an annuity of £250 during her life, and from and after the decease of the said Richard Blair Cullen, but subject to the said jointure, to the use of the first and other sons of the said Richard Blair Cullen and Jane Cullen, in tail male, and in default of issue male to the use of their daughters in fee, and in default of such issue, then to the use of the said Graham Lemon, his heirs and assigns, for ever."

The effect of this deed was that Graham Lemon became entitled to an estate *pur auter vie* in possession, and, subject to the intervening limitations for the children of Richard Blair Cullen and Jane Cullen, became tenant in fee-simple in remainder. That is to say, he had an estate in fee, contingent on there being no children of Richard Blair Cullen, and there never were any.

Graham Lemon died in the year 1886, and Richard Blair Cullen survived him, and died in 1891, without children, and thus all the limitations in favour of children came to an end, or rather never came into existence, and the only limitations which took effect were those in favour of Graham Lemon and the widow of Richard Blair Cullen.

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Is is, I think, clear from the passages which have been cited from Preston on Conveyancing, and the notes to *Lewis Bowles' Case* in Tudor's Real Property Cases, that if, instead of being tenant for the life of Richard Blair Cullen, Graham Lemon had been tenant for his own life, there would have been a complete merger, and the ultimate remainder in fee would have coalesced with the life estate. Nothing, I think, turns on the fact that the limitation is to the use of Graham Lemon "*and his assigns*" rather than to Graham Lemon "*and his heirs*" for the life of Richard Blair Cullen, as in the latter case the heir would take as special occupant, and not by descent. But the difficulty I felt in the case was whether there is anything in the circumstances of an estate *pur auter vie* which would prevent a merger of the two estates limited to Graham Lemon; that is to say, is there any difference for the purposes of merger and the consequent attaching of a right of dower between a case in which the first estate is *pur auter vie*, and one in which it is for a man's life only. Mr. Fitz Gibbon has, in my opinion, put it upon the right ground when he says that the merger must take effect, if at all, at the earliest moment, that is, in this case, on the execution of the Landed Estates Court conveyance. There is no direct authority on the point, or no doubt I should have been referred to it; but I can see no distinction in principle between the two classes of estates such as would prevent merger taking place. In Perkins' Profitable Book (15th edition by R. J. Greening, [1827] page 67), mentioned by Mr. Lawson, the question is referred to at article 336:—"And if a lease of land be made to the husband for life, remainder to a stranger for years, remainder to the husband in fee, and the husband die during the years, the wife may recover dower: but execution shall stay until the term be determined, for this mesne remainder for years shall be no impediment; since the freehold and fee were sufficiently joined in the husband *simul et semel*, for the wife to have dower." The editor refers in the margin to a case of *Bates* v. *Bates* (1) in Lord Raymond's Reports. That case, which I have before me, does not decide the point. It was an action of dower.

(1) Lord Raymond, 326.

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Ralph Bates, the husband, was seised of the lands in question for life, with remainder to A and B, trustees for ninety-nine years, remainder to the heirs of the body of Ralph Bates, etc. It was argued for the defendant that the husband died seised of an estate tail executed, for the intervening estate being for years ought not to be regarded. The case was three times argued, and on the third argument judgment was given for the defendant on the ground that the husband had a freehold and inheritance in him, and the intervening estate being only for years, ought not to be regarded. It leaves the matter very much at large, but it does, however, support the note of the editor of Perkins on page 67 (*h*) which is as follows:—"So if the first estate be *pur auter vie* only, and limited to the husband *and his assigns*. And the interests under such limitations will unite even while resting in contingency, upon a conveyance to uses." The editor then refers to an apparently unreported case of *Trevelyan* v. *Trevelyan* (1), and gives a short note of it in the Addenda, p. 169. [The Master of the Rolls here read from the report, p. 169 (2)].

It would, I think, be too narrow a view to hold that the circumstance that the first estate here was an estate *pur auter vie* would prevent a merger in the estate of inheritance. Such merger, in my opinion, took place at once. Graham Lemon, therefore, had on the execution of the conveyance an estate of inheritance in possession, liable only to be defeated in the contingency, which did not happen, of their being children of Richard Blair Cullen. I am accordingly of opinion that the plaintiff, the widow of Graham Lemon, is entitled to dower out of the real estate comprised in the Landed Estates Court conveyance, and I shall add a declaration to that effect to my original decree.

W. L.

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June 20, 21, 22, 28.

The defendants appealed to the Court of Appeal (3).

Gordon, Q.C., and *Lawson* (*The Right Hon. The Mac Dermot, Q.C.*, with them), for the appellants.

(1) Com. Pleas, Tr. Term, 1826. (2) See case reported in 3 Bing. 616.—ED.
(3) Before FITZGIBBON, WALKER, and HOLMES, L.JJ.

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Matheson, Q.C., and *Gerald Fitz Gibbon*, for the respondent.

In addition to the authorities referred to in the Court below, the following were cited:—

(1) On the effect of the marriage settlement: *Carruthers* v. *Carruthers* (1); *Couch* v. *Stratton* (2); *Garthshore* v. *Chalie* (3); *Fyan* v. *Henry* (4); *Creagh* v. *Creagh* (5); *Re De Hoghton* (6); *Vizod* v. *Londen* (7); Roper on Husband and Wife, vol. i., p. 490, note (*d*), vol. ii., p. 20, note (*d*).

(2) On the effect of the Landed Estates Court conveyance: *Moore* v. *Moore* (8); *Snow* v. *Boycott* (9); *Plunket* v. *Holmes* (10); *Duncomb* v. *Duncomb* (11); *Phillips* v. *Phillips* (12); *Boothby* v. *Vernon* (13); *Kent* v. *Hartpole* (14); *Low* v. *Burron* (15); *Ex parte Sterne* (16); *Cordal's Case* (17); Bacon's Abr., title "Dower," B., 720; Mayhew on Merger, pp. 49, 50, 56; Park on Dower, pp. 62, 71, 72; Williams' Saunders (edit. 1871), vol. ii., p. 772 (*n*).

June 28.

FITZ GIBBON, L. J.:—

This is, in form, a suit for the administration of the real and personal estate of Graham Lemon, but we have been informed that the parties do not require a plenary administration under the Court, and that the litigation has been reduced, by a wise arrangement, to the discussion whether the land comprised in a certain Landed Estates Court conveyance is subject to dower for the plaintiff, who is the widow of Graham Lemon, the purchaser.

In opening the appeal, Mr. Lawson urged three grounds, as negativing this right of dower:—(1) that the annuity of £500 a-year provided for the plaintiff, by the settlement upon her marriage, dated April 29, 1884, was a provision in bar or satisfaction of dower; (2) that the plaintiff had released or waived her right to dower out of these lands, if it ever existed; and (3) that

(1) 4 Br. C. C. 512.
(2) 4 Ves. 391.
(3) 10 Ves. 1.
(4) 2 Dr. & War. 636.
(5) 8 Ir. Eq. R. 68.
(6) [1896] 2 Ch. 392.
(7) Wm. Kelynge, 17.
(8) [1892] 2 Ch. 87.
(9) [1892] 3 Ch. 110.
(10) 1 Lev. 11.
(11) 3 Lev. 477.
(12) 1 P. Wms., 40.
(13) 9 Mod. 147.
(14) Sir T. Jones, 76; 1 Ventr. 306.
(15) 3 P. Wms., 263.
(16) 6 Ves. 156.
(17) Cro. Eliz., 315.

the estate which Graham Lemon took under the conveyance was not one to which the right of dower attached.

The second point, so far as *release* was concerned, was met at once by the principle that a release extends only to the property which is in the contemplation of the parties to it, and here the property included in the Landed Estates Court conveyance was not within the scope of the release. But it was urged that there was such a waiver by conduct as amounted to a release, on the ground that the widow was now *estopped* from putting forward her claim. The equity upon which such an estoppel must rest is very difficult to establish. The conduct which creates an estoppel must be such as to have led the other party to act, upon the faith of it, in a manner different from what he would otherwise have done; for example, to give up claims upon which he would otherwise have insisted. There is no evidence whatever on which this doctrine can be brought into this case. Short of release, there is no final waiver, and no effective estoppel, and there is no release.

The question whether the annuity under the settlement bars or satisfies the claim of dower, is one upon which there are many cases, to which Walker, L.J., will refer in more detail. Whether a jointure, or any other provision for a widow, bars or satisfies the claim of dower is a question of contract. Has she, in consideration of the jointure or other provision, contracted to give up her *primâ facie* legal right of dower? Where the provision is given in terms as a "jointure," dower has been held to be barred, upon the principle that, "jointure" being the general and technical description of a widow's provision out of her husband's lands, it follows that where she has by contract taken a specified jointure, *eo nomine*, as a provision out of her husband's estate generally, including his lands, she cannot claim a further provision out of the same property, as for dower.

The question being whether the wife has contracted to give up her right to dower, and to take the other provision instead, I am prepared to say, on principle, if the contract is proved, that it can make no difference whether it be realty or personalty that is to supply the substituted provision. What she has got, and the form and terms in which she has got it, may be evidence as to whether she

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has, or has not, contracted to give up her dower, but nothing more. Mr. Lawson relied upon *Vizod* v. *Londen* (1) to show that a provision given to a widow out of personal estate was sufficient *per se* to bar dower. The case has had doubt thrown upon it, but now that it has been identified under the various names which it bears in the books, and that the facts as stated by Wm. Kelynge have been examined, I think that the decision was plainly right.

The report says:—

> "A bond was entered into before marriage by the defendant's husband for the sum of £500, and the condition recited the intended marriage, and that the obligor was to receive a competent fortune, and thereupon the obligor was *to settle lands of the yearly value of* £14, as counsel should advise, to the use of the defendant for life, *for her livelihood and maintenance*, if the marriage should take effect, and she should survive her husband; otherwise the bond to stand in full force. The question was if this should be a bar of dower. The Master of the Rolls was of opinion it was not; but King, Chancellor, being of a different opinion, reversed his decree. King, Chancellor:—'Several estates that are not specified in the statute, 27 Hen. 8, c. 10, 1*b*, are yet within the equity of the statute, and the present is not a case within the letter of it; but when an estate is settled so as to fall and take effect immediately upon the death of the husband, with a covenant or instrument declaring it to be as a jointure, or in bar of dower, and is tantamount to its being an actual settlement within the letter of the statute, what is necessary to be done by the words of the statute? The words are expressly (*for the jointure of the wife*): but the statute does not say that the jointure must be to be expressed in bar of dower. The bar of dower is only a consequence of its being a jointure: and a jointure, according to my Lord Coke, is a provision and maintenance for the wife: and sure this is expressed to be so, and therefore within the description of it. Before the Statute of Frauds (29 Car. 2) a parol agreement of any such provision being made as a jointure was sufficient.'"

The provision for the wife contemplated by the parties to the antenuptial contract was a settlement of lands, by rentcharge or otherwise, by way of jointure, of £14 per annum for her livelihood. The bond was not the provision; it was the security for that provision, and its terms evidenced the terms of the contract. The action was brought by the heir to have the husband's lands declared free of dower, and the question was whether the provision made

(1) Wm. Kelynge, 17.

for the wife—viz. the £14 per annum out of lands, secured by bond, was to be taken in bar or satisfaction of dower. The bond, as the collateral security, proved the contract that the provision which it secured was to be taken as a provision in lieu of dower. Thus explained, the decision is manifestly right, and any doubts thrown upon it have arisen from the insufficiency of the statements of the facts contained in the other reports of the case.

Here there is no evidence that the wife contracted to take the annuity given out of the husband's personalty in bar or satisfaction of her dower out of his realty. The lands now in question were acquired by the husband after the settlement. They were an increase of his property, not contemplated by the settlement, which contains no reference to after-acquired lands, and there is no presumption that the wife is not to share her husband's increasing prosperity by receiving dower out of the increment to his property, especially when he could have barred her dower if he pleased.

The remaining question is very technical, and I should not be surprised to find "real property lawyers" arriving at different conclusions upon it. Is the estate of Graham Lemon under the Landed Estate Court conveyance one of such a nature or tenure as to be subject to dower? In other words—did the estate which Graham Lemon took for the life of Richard Blair Cullen (and which, as an estate *pur auter vie*, I assume not to be, *per se*, subject to dower) so far amalgamate in technical law with the remainder in fee, which Lemon took in the event of failure of issue of Cullen, as to subject the amalgamated estate to dower, as if it were an estate in fee in possession? It seems settled that if the particular estate be an estate for the husband's own life, and he has an ultimate remainder in fee, he has an estate out of which dower will issue. It also seems settled that this liability to dower will not be displaced by the interposition of a term of years between the life estate and the ultimate remainder in fee; and further, that if the first estate taken by the husband is a term of years, and it be followed by an ultimate remainder in fee, dower will still issue out of the lands. We are, therefore, reduced to the question whether the fact that the first estate taken by the husband is an estate *pur auter vie*, prevents dower from attaching

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to lands in which he has a remainder in fee, subject to be defeated by an event which has not arisen.

It is argued that we cannot give the dower, because we must give it, if at all, out of an "undescendible freehold," and as against a special occupant. But I think that the answer to this objection is to be found in the authorities which decide that the amalgamation *ad hoc* of the particular estate and the ultimate remainder in fee takes place at the moment when the parties set their hands to the conveyance, and that the dower attaches to the amalgamated estate, which takes its *dowable* character from the remainder, which absorbs, and so nullifies, as it were, *the undowable* character of the particular estate.

An estate *pur auter vie* is the weakest form of freehold; it offers no obstacle to such an amalgamation which is not at least equally offered by an estate for the husband's own life, or by a long term of years; and I think that it must be taken as contingently, and for the special purpose of dower, uniting with the ultimate remainder in fee, subject to the opening of the two estates again, and to the defeat of the dower, and of the husband's estate out of which it issues, if the event happens upon which the intervening limitations take effect.

Some doubt is created by the passage in Park on Dower, and by the language of Stirling, J., in *Moore* v. *Moore* (1). The decision in that case can be supported upon other grounds. There an estate to support contingent remainders was interposed. *Cordal's Case* (2) does not appear to have been cited. There are passages in the judgment which I cannot reconcile with *Hooker* v. *Hooker* (3), or with the law as stated by Fearne and Preston. Under these circumstances, I can only say that if the reasons given by Stirling, J., conflict with the decision now under appeal, I cannot follow him.

WALKER, L. J.:—

I concur. I do not think it necessary to add anything on the question of release.

The first substantial question which arises is whether the wife

(1) [1892] 2 Ch. 87. (2) Cro. Eliz. 315. (3) Ca. t. Hardwicke, 13.

is, by her own contract contained in her settlement, excluded from dower, *i.e.*, whether the words used are sufficient to show an intention on her part that she shall not have it out of her husband's lands of inheritance if he happens to die intestate.

One of the trusts of the marriage settlement of 29th April, 1884, is "for the purpose of making a provision for the said Isabell Ross, by securing to her the payment of an annuity or yearly sum of £500 for the term of her natural life," and that contract is carried out by the conveyance of leaseholds for years to the trustees, upon trust after the death of Graham Lemon to pay her the annual sum of £500 during her life.

It is quite clear that a provision out of personal estate may under certain circumstances be a bar of dower, and as a general rule it will be so where it is given in terms for a jointure, because jointure is a technical word, and is the one used in the statute; and where the wife is provided for out of lands on which dower would otherwise attach, an inference may probably, as a general rule, be drawn that she was not intended to have dower out of the same lands as well, as in *Hamilton* v. *Jackson* (1); but in each of those cases regard must be had to the particular contract made. It is not at all necessary to say whether there may not be a provision issuing out of personal estate, and called a jointure, which will bar dower. That depends on the contract to be interpreted by the rule stated by Lord St. Leonards in *Hamilton* v. *Jackson* (1), viz. that "in order to exclude the right of the wife to dower, there must be either an express declaration or such a plain intention to be collected from the whole instrument, as will satisfy the Court that in excluding the claim to dower, it does not incur the danger of going contrary to the intention of the parties to the contract."

Counsel for the appellant mainly relied upon *Vizod* v. *Londen* (2), and indeed it was the only case on which any argument could be based; but when the case is looked into, it appears to me capable of being supported on its special facts. There a bond was given subject to a condition that the obligor should settle lands of the yearly value of £14, as counsel should advise, to the use of the defendant for life, for her livelihood and maintenance, if the

(1) 2 Jon. & Lat. 295. (2) Wm. Kelynge, 17.

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marriage should take effect, and she should survive her husband; otherwise the bond to stand in full force.

The lands appear not to have been settled, and the husband then brought a bill against the wife to have it declared that she was barred of dower by the bond. The annuity out of the real estate was, I think, a provision which might fairly be considered a jointure, and the bond to secure it was treated as on the same footing as the thing to be secured, and in that view the case is intelligible and I think correctly decided.

Further, as dower is now capable of being barred by the husband's disposition, it seems to me that the case is very like *Willis* v. *Willis* (1), where it was held that a widow was not barred of free-bench by a contract to surrender copyholds for the wife's use for life, if surviving, though it was done under a contract to "make some provision for Harriett Hill, in case she should survive her said intended husband," and the Master of the Rolls, held that the event of the husband dying intestate and without having, as he might, barred his wife's free-bench by surrender, was not contemplated and was not provided for by the contract. Dower in the present case could have been barred by the husband under the Dower Act, and in that way has the incidents of free-bench. I think there is nothing in the wife's contract to exclude her from the chance of dower in the event of the husband dying intestate seized of lands of inheritance. Her having that chance is quite consistent with the certain provisions out of personal estate made for her.

I am therefore of opinion, that the widow was not barred of her dower, if the lands out of which she claims it are dowable lands, and this is the second question. By the Landed Estates Court conveyance of 12th July, 1864, Judge Longfield granted those lands, consisting of inheritable fee-simple estates to William Redmond Lemon, his heirs and assigns, in trust for and during the life of Richard Blair Cullen, to permit Graham Lemon and his assigns to receive and take the rents for his and their own use, and after the decease of Richard Blair Cullen, to the use that Jane Cullen, the wife of Richard Blair Cullen, should,

(1) 34 Beav. 340.

if she survived him, receive a jointure of £250 per annum, and subject thereto, to the use of the first and other sons of Richard Blair Cullen on the body of Jane Cullen, lawfully begotten, in tail male, and in default of such issue male, to the use of the first and other daughters of Richard Blair Cullen on the body of Jane Cullen lawfully begotten, and their heirs, as tenants in common, and in default of such issue, then to the use of the said Graham Lemon, his heirs and assigns, for ever, subject to certain charges mentioned in the conveyance, including a mortgage for £1200.

Graham Lemon, thus acquired an estate of freehold for the life of Richard Blair Cullen, with an ultimate remainder to himself in fee-simple, there being interposed between those two estates, contingent remainders to the sons and daughters of Richard Blair Cullen on the body of Jane Cullen lawfully begotten, which existed only in possibility at the date of his purchase, and which in fact never came into existence, and ceased to be possible in 1891, when Richard Blair Cullen died. Graham Lemon himself died on the 8th October, 1886.

The appellants' counsel, under this state of facts, put forward two contentions, one that the interposition of the contingent estates between the life estate and fee-simple prevented the estates uniting in Graham Lemon, so as to make his wife dowable; and secondly, that the fact of the first estate being *pur auter vie* prevented that union.

For the first of those propositions they relied on *Cordal's Case* (1), and it is stated *Cordal's Case* (1) supports the argument. It is not clear how *Cordal's Case* (1) came before the two Judges who, *ex relatione* Lord Coke to Croke, expressed the opinion that the interposition of the possible estates prevented union. The authority of it is denied by Lord Hardwicke, in *Hooker* v. *Hooker* (2) and it is inconsistent with what is said by Lord Hale in *Purefoy* v. *Rogers* (3) and with *Lewis Bowles' Case* (4).

In *Hooker* v. *Hooker* (2) there is the difference that the husband, whose wife was held entitled to dower was dead without issue, and therefore it was impossible that the contingent remainder

(1) Cro. Eliz. 315.
(2) Ca. t. Hardwicke, 13.
(3) 2 Wm. Saunders, 772.
(4) 11 Rep. 79.

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should ever vest, and the possibility not only did not happen, but never could; but I do not think this prevents the estates being executed *sub modo* till the happening of the contingency.

Lord Eldon in *Doe* v. *Scudamore* (1) states the case of *Hooker* v. *Hooker* (2) as an authority to be recognized.

In *Lewis Bowles' Case* (3) the facts were:—A covenant to stand seized in consideration of an intended marriage to the use of T. and A., his intended wife, for their lives without impeachment of waste, and after their decease to the use of the first issue male, and to the heirs male of such issue lawfully begotten, and so on to the second, third, &c., issue male, remainder to the use of the heirs male of T. and A., and for want of such issue to the use of B., and the heirs male of his body, remainder to the heirs of the body of T. and A. T. died leaving issue by A., one J., who afterwards died, and it was resolved that T. and A., were seized of an estate tail executed *sub modo*, viz. until the birth of issue male, and thus by operation of law the estates are divided.

This is one of the cases cited by Mr. Preston, at vol. 3, p. 378, where he says:—"To some purposes, indeed, the two estates may unite notwithstanding a contingent remainder is interposed between them, and although, for the purpose of supporting the contingent remainder, the particular preceding estate is considered distinct from the more remote estate vested in the owners of the particular estate, yet unless the contingent remainder becomes vested in interest the person who is the owner of the several estates will be treated as seized of the inheritance from the first instant, and in the meantime, till the contingency arises, as having a qualified seizin of the inheritance, and such seizin will entitle him to all the remedies and privileges of the owner of an immediate estate of inheritance as distinguished from the tenant of a mere freehold having a particular estate." And he concludes the paragraph—"There will be a temporary union and consolidation of estates, leaving an opening for the contingent remainder, when it can vest in interest."

There are other passages in Mr. Preston's work to the same effect.

(1) 2 Bos. & P. 289. (2) Ca. t. Hardwicke, 13. (3) 11 Rep. 79.

Thus the better opinion seems to me to be that there is a temporary consolidation of the estates, subject to the rights of those entitled under the contingent remainders to have the benefit of them when they vest—the estate opening as the contingent remainders require—but that meantime the husband is seized solely in fee. If there is an actual estate interposed, one which is not merely a possibility, the two estates will be kept distinct, and dower will not attach, as in *Duncomb* v. *Duncomb* (1), the authority of which is recognised by Lord Hardwicke in *Hooker* v. *Hooker* (2). But then it was said that the fact of the first estate being *pur auter vie* prevented its union with the fee in the same grantee, and that the character of the estate *pur auter vie* with its incidents of passing to the special occupants and immunity from dower, continued; but it seems to me this begs the whole question, for it is only by remaining distinct that those incidents can have existence. If the lands had been granted to Graham Lemon for the life of Richard Blair Cullen, with remainder to Graham Lemon himself for life, the estate of Graham Lemon *pur auter vie*, being a lower estate of freehold, would merge in the larger estate for Graham Lemon's own life: 1 Cruise, Dig., p. 108 (ed. 1824). Why then should not the same class of estate merge in the greater estate in fee of the same grantee. I cannot see any legal principle to prevent the same consequence following.

The case of *Moore* v. *Moore; re Michell* (3), cited by Mr. Lawson, deserves notice, as there Mr. Justice Stirling held a widow not entitled to dower upon grounds which as stated appear to apply to this case. The facts require statement. Anne Michell by her will devised certain lands to Graham Francis Moore (second son of James Carrick Moore) for life, with remainder to his first and other sons successively in tail male, with remainder to his first and other daughters in tail, with remainder to the use of her cousin John Carrick Moore (the first son of the said James Carrick Moore) for life, with remainder to trustees to preserve contingent remainders, with remainder to the second son of John Carrick Moore in tail male, with remainder to the third and younger sons of John Carrick Moore successively in

(1) 3 Lev. 437. (2) Ca. t. Hardwicke, 13. (3) [1892] 2 Ch. 87.

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tail male, with remainder to the first son of John Carrick Moore in tail male, with remainders over. The will next directed that Graham Francis Moore and every other person who became entitled to the possession of the rents and profits should take the names and arms of Michell and Esmead. Then followed a bequest of personalty to be laid out in lands settled to similar uses. The testatrix died in 1844, and on her death Graham Francis Moore duly assumed the names and arms directed, and entered into possession of the devised estates. In 1872 John Graham Carrick Moore, who was the only son of John Carrick Moore, disentailed the lands settled by the will, subject to the uses prior to his estate tail. Graham Francis Moore died in 1883 without ever having been married; and the devised lands devolved upon John Carrick Moore as next tenant for life, who did not assume the names and arms, and in 1884 the estates passed to John Graham Carrick Moore. Therefore, he was equitably entitled during the life of his father. He married in 1872: died without issue and intestate in 1890, leaving his father, the plaintiff, John Carrick Moore, his heir-at-law. The defendant was the widow of John Graham Carrick Moore; and one of the questions was whether she was entitled to dower out of the lands on the death of her husband. John Carrick Moore, the father, had been tenant for life, with remainder to trustees to preserve contingent remainders; and during his father's life those trustees were to pay the rents to John Graham Carrick Moore, and this equitable estate was determinable on the birth of a second son of John Carrick Moore; and John Graham Carrick Moore had also a vested legal estate in fee in remainder expectant on his father's death, and the failure of the limitations to the father's second and subsequent sons.

Mr. Justice Stirling held that the widow was not entitled to dower. He considered that as the first estate was equitable and the remainder legal, it was only under the Dower Act that dower could accrue, and the test he applied was whether the estate was "equal to an estate of inheritance in possession" within the words of that statute. He held it was not and he says:—"The equitable interest in possession is severed from the estate of inheritance by the interposition of a succession of estates tail which very possibly

may never arise, but which, in my judgment, prevent the interest to which J. G. Carrick Moore was so entitled at the time of his death from being equal to an estate of inheritance in possession; such interest was at most one which might in the event prove to be equal to an estate of inheritance."

It is not necessary in the present case, as I read the limitations, to have resort to the Dower Act. There are here no trustees to preserve contingent remainders to deal with. The decision of Mr. Justice Stirling may be correct in the case before him, but I hardly think it could be supported on the ground of the interposition of the contingent estates. It would, I think, be more consistent with the intention of the Act that the right to have dower out of the equitable estate should be analogous to the right out of a legal estate, and that appears to be the ground on which, in *Smith* v. *Spencer* (1), Vice-Chancellor Stuart held that a widow was entitled to dower out of an equitable estate in fee, subject to an executory devise over, as had been decided to be the case where the estate was a legal one. Be that as it may, the limitations here are not the same as in *Moore* v. *Moore* (2); and the case comes back to the point whether *Cordal's Case* (3) is a binding authority. In my opinion the view of Mr. Preston is more consistent with principle and authority; therefore, on the second point also, I concur with the Master of the Rolls.

HOLMES, L.J.:—

I concur both in the judgment of the Court and in the reasons that have been given for it.

The first question argued seems to me to be entirely free from doubt. The mere fact of a husband providing out of his personal estate an annuity for his wife, commencing at his own death, does not in itself deprive her of dower. To give such an annuity this effect, the least that is required is something to indicate an intention that the widow was not to enjoy both provisions. If the annuity is described or referred to as a jointure, it is well settled that this intention ought to be inferred; and of course

(1) 2 Jur. N. S. 778. (2) [1892] 2 Ch. 87. (3) Cro. Eliz. 315.

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there are many other forms of expression that would lead to the same inference. In the present case, the only thing relied on is the recital in the marriage settlement that one of its purposes is to make a provision for the wife. But these words are nothing more than the expression of what must be implied from every settlement of the same kind, and afford no indication that it is to be her only provision, or that she is not to be entitled to any other interest in her husband's property which the law gives her. There would, I believe, never have been any question on this point, were it not for the old case of *Vizod* v. *Londen* (1), which has been already fully dealt with, and as to which I only say, that even if it went the length contended for by the appellants, which I doubt, I would be unable to act on an authority which, on this assumption, would be inconsistent with the entire course of modern decisions.

The second question is one with which at the present day we are less familiar than an older race of lawyers, but which I think is equally well settled. Here, too, is there the shadow of a very old decision, if it can be called a decision. But *Cordal's Case* (2) notwithstanding, I think that for more than a century and a-half it has been established that where a husband is seized of lands for his own life, with remainder to himself in fee, and there are only contingent remainders interposed, the husband has such an estate as entitles his widow to dower out of the lands. The present case differs from the above only in the circumstance that the husband's estate is *pur auter vie*, with remainder thereon to himself in fee, there being interposed contingent remainders. I am unable to distinguish the two sets of limitations. In *Moore* v. *Moore* (3), the subject with which I am now dealing does not appear to have been argued; and in so far as the language of Stirling, J., is inconsistent with the views I have expressed, I am unable to agree with it, although I can see in the facts of the case good grounds for his decision.

Solicitors for the plaintiff: *Stanuell & Son.*
Solicitors for the defendant: *Casey & Clay.*

G. Y. D.

(1) Wm. Kelynge, 17. (2) Cro. Eliz. 315. (3) [1892] 2 Ch. 87.

CLARK *v.* TAYLOR.

(1899. No. 15.)

V.-C. 1899. Feb. 4, 15. March 21.

Appeal. April 17, 18.

Landlord and tenant—Land Law Acts, 1881-1896—*Notice by tenant of intention to sell tenancy—Election by landlord to purchase—Abstract of title of tenant—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 1.

Where, under section 1 of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), a tenant gives notice to his landlord of his intention to sell his tenancy, and the landlord elects to purchase the same:—

Held, by the Court of Appeal, reversing the decision of the Vice-Chancellor, that the landlord is entitled to call upon the tenant to furnish an abstract and to deduce title to the holding.

SUMMONS under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).

The plaintiffs, John Clark and Rev. Hugh Farrelly, were executors and trustees of Jane E. Fulham, deceased, and in the month of April, 1897, they served an originating notice of an application to the Land Commission to fix a fair rent for certain lands known as Trubly and Bective, held by them as tenants under the defendant Captain Taylor. In the said notice the tenants were described as executors and trustees of Jane E. Fulham. The defendant was represented on the hearing of the application, and by order made in the month of October, 1897, the fair rent was fixed at £260 5*s*.

In December, 1897, the plaintiffs served notice of their intention to sell their tenancy, and the defendant thereupon served notice (Form No. 2, Land Commission Rules, January 2, 1897) of application to the Land Commission to ascertain the true value thereof: see *Clark, Tenant*; *Taylor, Landlord* (1).

On the 7th October, 1898, a Sub-Commission fixed the true value of the tenancy at the sum of £2072.

(1) [1898] 2 I. R. 586.

V.-C. 1899. CLARK v. TAYLOR.

Clark subsequently furnished the defendant's solicitor with a copy of the will of Jane E. Fulham, and asked for draft assignment for approval. The defendant's solicitor thereupon called for an abstract of the tenants' title; Clark refused to furnish such abstract.

This was an application by the plaintiffs for a declaration that the defendant was not entitled to require the plaintiffs to show title or deliver an abstract of title.

Miles Kehoe, Q.C., for the plaintiffs:—

A landlord exercising his right of pre-emption under the 1st section of the Act of 1881 acquires the entire interest in the tenancy, though the tenant may not be the absolute owner thereof. Even, if he does not, he is not entitled to obtain more than the tenant has to give. A tenant selling in the ordinary way could protect himself by conditions with respect to any defect of title; but in such a case as the present, the sale is a compulsory sale, and he would have no way of doing so. The landlord knows from his own books who his tenant is. The results would be most serious if a landlord exercising his right of pre-emption under the statute were to be entitled to require a 40-years' title including searches: the expense of making such title would in most cases be out of all proportion to the purchase-money.

But the tenant need not be absolute owner to give the landlord a good title to the tenancy. As the entire reversion is bound by an order fixing a fair rent made on a tenant's originating notice served only on the then landlord, so a landlord exercising his right of pre-emption need not have a conveyance from all the persons interested in the tenancy; he need only deal with the person at the time occupying the position of tenant. Section 1 of the Act provides that "the tenant for the time being" may sell "his tenancy": sub-section 2 directs that the tenant shall give notice of his intention to sell "his tenancy": sub-section 3 enables the landlord to purchase "the tenancy." See further, section 57, as to the meaning of the words "tenant" and "landlord" in the Act. Accordingly the exercise by the landlord for the time being of the right of pre-emption from the tenant for the time being binds the

tenancy and all persons interested in it. See *Farrelly* v. *Waller* (1) and the judgments in that case of Palles, C.B., and Fitz Gibbon, L.J. How far is the right contended for by the landlord to be extended? Is it to apply to the analogous case dealt with by the second proviso in section 21—the Court may authorise the landlord to resume the holding in the manner and on the terms provided by the fifth section with respect to resumption—or to the case provided for by the latter section which gives power to the Court in certain cases to authorise resumption during the tenancy. If the landlord's contention be right the existence of charges which the tenant could not clear off would effectually prevent the landlord acquiring the tenancy; such charges might be fraudulently created to prevent his doing so, and the right of pre-emption would be defeated. The entire scheme of the Act is that the landlord and the tenant for the time being may deal with one another as if they were absolute owners of the reversion and tenancy respectively; see *ex. gr.* sections 10, 11, 22. If a limited owner of a tenancy served an originating notice to have a fair rent fixed, and his application was dismissed, could a subsequent owner afterwards succeed in a similar application? Here the fair rent was fixed in a proceeding between the present parties as tenant and landlord respectively.

Herbert Wilson, for the defendant:—

The landlord is entitled to get a good title like any other purchaser. A tenant selling to a purchaser other than his landlord is bound to deliver an abstract and show title in the ordinary way: *In re Priestley and Davidson's Contract* (2). There is no difference in principle between that case and the present, where the purchaser is the landlord. The entire argument on the other side is based on *Farrelly* v. *Waller* (1), but the question there—so far as it affects the present case—was whether the existence of equitable interests created by the tenant precluded the landlord from dealing with him as vendor, and compelled the landlord to deal with the owners of the equitable interests. The Court of Appeal decided that the landlord must deal with his actual tenant, but did not decide that

(1) 28 L. R. I. 122. (2) 31 L. R. I. 122.

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the landlord could safely pay the purchase-money to that tenant without inquiry. There may be two classes of incumbrances affecting a tenant's interest of which the landlord has no notice:— 1. Equitable charges created, *ex. gr.* by deposit of the lease under which the lands may have been held (the present case) prior to the fair rent order, or by deed containing also a power of attorney to act for the tenant under the Land Law Acts—the ordinary mode of mortgaging a statutory tenancy. 2. Legal mortgages. In *Fisher* v. *Coan* (1) this Court decided that a legal mortgage of a statutory tenancy was not a sale within the 1st section of the Act of 1881, and that no notice to the landlord of the intention to execute it was necessary. The Legislature has adopted that decision by section 19 of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), which makes a mortgage to one person a sale under section 1 of the Act of 1881, but deprives the landlord of all rights under that section save the barren one of objecting to the mortgagee, and that when knowledge of the mortgage happens to reach him: see Land Commission Rules (2nd January, 1897), 102; *Mullan* v. *Traill* (2).

It is said that this is a compulsory sale; so it is, but in all other cases of compulsory sale the person whose interest is acquired must show title, or the purchase-money is paid into Court. Here the landlord is ready to pay the purchase-money into the Land Commission Court: the Land Commission have jurisdiction to deal with the matter: Act of 1881, s. 37 (5); Rules (2nd January, 1897) 66; see also the judgment of Barry, L.J., in *Farrelly* v. *Waller* (3). If, on the other hand, this is not a dispute between landlord and tenant so as to be within section 37 (5), then the decision in *In re Priestley and Davidson's Contract* (4) applies.

Miles Kehoe, Q.C., in reply:—

Farrelly v. *Waller* (3) applies. In that case there were equitable interests which could not be conveyed. It is suggested that the purchase-money could be paid into Court, but there is no machinery for the purpose, as there is under the Lands Clauses

(1) [1894] 1 I. R. 179.
(2) [1898] 2 I. R. 378.
(3) 28 L. R. I. 122.
(4) 31 L. R. I. 122.

Acts, nor is there any provision for adjudicating on the rights of the parties or for the payment of the costs incurred. The Act of 1881 contains certain provisions as to payment into Court, but they have no application to such a case as the present: see *ex. gr.* section 1 (9). The Land Commission have no power to order specific performance of a contract for sale of a tenancy. Section 37 (5) of the Act of 1881 applies only to disputes "arising under this Act," and Rule 66 (2nd January, 1897) is applicable only where a question arises with respect to rights to money "which the Court has power to decide." Though the plaintiffs might be in a position to agree to sell only subject to restrictive conditions as to the title, it is contended that the landlord on exercising his right of pre-emption becomes entitled not only to buy the holding for less than it would bring in the market, but to have a forty years' title to the tenancy deduced. This, however, does not shake the plaintiffs' position that the defendant on electing to purchase acquires a right to the tenancy itself. In *Farrelly* v. *Waller* (1) Lord Ashbourne, C., says (p. 128), "If there is one thing plain on the Land Law Act of 1881 it is this, that it intended to confer a right of pre-emption upon the landlord; and that right is not to be interfered with or frittered away by any acts of the tenant." See also the judgments there of Palles, C.B., and Fitz Gibbon, L.J. The effect of section 19 of the Act of 1896 is that in the cases provided for the landlord has no right of pre-emption—he can only, on reasonable grounds, refuse to accept the alienee as tenant. The 1st section of the Act of 1881 is not to be interpreted as if it dealt with sales of fee-simple estates. At the time of the passing of the Act tenancies from year to year were of little value—the landlord could determine them by notice to quit, and to do so he was not concerned to inquire if the tenancy were incumbered; he was obliged merely to serve the notice on the person in possession at the time as tenant: see Furlong, Landlord and Tenant (2nd ed.), 623; *Sweeny* v. *Sweeny* (2). So since 1881, the landlord no longer has the power of *destroying* the tenancy by eviction, but he has the power of *purchasing* it, not merely by contract, but through his statutory power of pre-emption on payment of

(1) 28 L. R. I. 122. (2) I. R. 10 C. L. 375.

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March 21.

the specified value: see *per* Fitz Gibbon, L.J., in *Farrelly* v. *Waller* (1), p. 133.

THE VICE-CHANCELLOR:—

This case comes before me for the decision of a question of general importance to landlords and tenants, arising upon the Land Law Act, 1881, namely, whether a landlord who has served notice of exercising his right of pre-emption under the 1st sect. of the Act, is entitled to require the tenant to make out his title to the tenancy, as in ordinary cases of contracts for sale, or whether the landlord can safely deal with the tenant alone, in which case he would not be entitled to require a good title to be shown in the ordinary way. The question depends entirely on the operation of the Act, and cannot be regarded as governed by the rules affecting purchases made by ordinary contract between vendor and purchaser.

The Act provides that the tenant for the time being of every holding (not excepted from the Act) may sell his tenancy for the best price he can get, subject to the regulations specified in the Act, and also to the provisions therein contained with respect to the sale of a tenancy subject to statutory conditions, the second of which is that he must give to the landlord notice of his intention to sell his tenancy, and the third is that, on receiving such notice, the landlord may purchase the tenancy for such sum as may be agreed on, or as, in the event of disagreement, may be ascertained by the Court to be the true value thereof. The Act gives definitions of both tenant and landlord, the tenant meaning a person occupying land under a contract of tenancy, the landlord meaning the immediate landlord or the person for the time being entitled to receive the rents and profits or take possession of the land held by his tenant. Applying these definitions to the section in question it is to be read as meaning that the person for the time being occupying the holding under a contract of tenancy may sell as prescribed, and that he shall give the prescribed notice to the immediate landlord or the person for the time being entitled to receive the rents and profits or take possession of the holding. The

(1) 28 L. R. I. 122.

transaction is therefore intended to be between the occupying tenant for the time being, whoever he may be, and the person who is entitled to receive the tenant's rent, or take possession of his holding, whoever he may be. These persons are empowered to do whatever is required for carrying out the operation so provided for. The landlord has no difficulty in ascertaining who is the person in occupation of the holding, and the tenant knows who it is to whom he has been paying his rent. There is no room as between them for doubt or dispute as to their relative positions; no necessity for a formal deduction of title to show that they occupy those respective positions. The Act seems to intend that this should be so. If it were otherwise, the tenant would have the same right to call upon his landlord for a formal deduction of *his* title, and would endanger his own position and defeat his object of selling his holding. Considering the very wide extent of these relations, this portion of the Act would in fact be unworkable. It seems strange that such a requisition should come from a landlord—one of a class for whose benefit this right of pre-emption was established. In my opinion the Act provides for a dealing between two persons, one being the tenant in occupation wanting to sell and representing all interests in the existing tenancy, and the other the person receiving the rents of such occupying tenant and representing all interests in the reversion for the purposes of this statutory dealing.

The views I have thus put forward have been formed, not only upon the provisions of the Act and the reason of the thing, but upon the very important views on the subject expressed by the the Judges of the Court of Appeal in the case of *Farrelly* v. *Waller* (1). That important case seems to me to rule in principle the question before me. The leading principle there acted upon was, that by the statute this right of pre-emption is inherent in the very creation of a statutory tenancy, and that the tenant's rights in the holding must be and are under all circumstances subject to the landlord's right of pre-emption in cases where the statutory tenant desires to sell. Everyone taking under the original tenant, and claiming under him, whether by assignment of

(1) 28 L. R. I. 122.

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the legal interest in the tenancy, or by the creation of an equitable interest therein or a charge thereon, takes subject to this statutory right of the landlord. Any person dealing with the tenant, must do so subject to this right, and he has no ground of complaint if that right is exercised. It is nothing to the landlord whether there were any such dealings by his tenant. There could not be a valid transfer of the legal estate in the holding without the knowledge of the landlord, and claimants of any equitable interest or charge must have become so with full knowledge of the statutory right of the landlord. The case referred to of *In re Priestley and Davidson's Contract* (1), before the Master of the Rolls, has no application to the present, as that was an ordinary sale of the interest of a statutory tenant, and not a case of pre-emption by a landlord under his statutory right. I cannot see any grounds for the landlord's investigation of the tenant's title. If the transaction is carried out between him and his tenant, he will be entitled to be put into possession of the holding, and how could that possession be disturbed?

I am therefore of opinion that the landlord is not entitled to call upon the tenant to deduce title to the holding.

D. M'C. M.

Appeal. 1899. April 17, 18.

The landlords appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ.)

Herbert Wilson, for the appellant.

Miles Kehoe, Q.C., and *Ignatius O'Brien*, for the respondents.

The arguments were the same as those in the Court below.

April 18.

LORD ASHBOURNE, C.:—

This case comes before us on appeal from the decision of the Vice-Chancellor on a summons under the Vendor and Purchaser Act holding that the vendors were not bound to show a good title or deliver an abstract of title to the purchaser, who

(1) 31 L. R. I. 122.

is a landlord exercising his right of pre-emption of the vendors' holding.

A lady named Jane Fulham died in the year 1897 possessed of the holding in question, which is a large farm containing 256 acres, or thereabouts, in the county Meath. The holding was originally held under a lease, but the lease had expired, and Miss Fulham remained on in possession after its expiration at the rent of £260 5*s.* per annum, which was the rent reserved by the lease. Her executors, the vendors, immediately after taking out probate of her will, applied to the Land Commission to fix the fair rent of the holding, and the fair rent was fixed at £260 5*s.*, the same figure as the rent reserved by the lease. The executors then announced to the landlord their intention to sell the holding, and the landlord replied that he desired to exercise his right of pre-emption. He forthwith applied to the Land Commission to fix the true value of the holding, and in October last the same was fixed at the sum of £2072. A short correspondence then took place, in which the landlord demanded and the executors refused to furnish an abstract of the tenant's title to the holding. The executors issued this summons to determine the question so raised.

The learned Vice-Chancellor, after argument and upon consideration, arrived at the conclusion that when a landlord is exercising his right of pre-emption under the Land Law (Ireland) Act, 1881, he is not entitled to demand an abstract of the tenant's title to the holding, and that the tenant was not bound to show a good title to the tenancy. The judgment of the Vice-Chancellor proceeds upon the construction of section 1 of the Act of 1881; but it is not based on any express provision contained in the Act of Parliament, but rather upon the learned Judge's view of what would be the reasonable course for the Legislature to prescribe for carrying out a sale by an occupying tenant to his landlord under the provisions of the Act. But I can see nothing in the Act to preclude the landlord from the ordinary right of a purchaser to see that he is getting what he desires to buy.

The Vice-Chancellor also based his decision on the authority of *Farrelly* v. *Waller* (1), the principle of which, he thought,

(1) 28 I. R. I. 122.

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strengthened his conclusion. In my opinion, however, that case in nowise helps the respondents' contention. Its circumstances were entirely different from those of the present case, and what was there decided was that the landlord's right of pre-emption was paramount, and was not suspended by the dealings of the tenant with the holding. Throughout the judgments in the case there is no hint or suggestion to the effect that the tenant need not show title to the holding if he is to receive the purchase-money.

I am, therefore, of opinion that the landlord, when exercising his right of pre-emption, merely steps into the position of any one who might otherwise purchase the holding in the usual way, and is accordingly entitled to the ordinary right of a purchaser to have an abstract furnished and title shown before he pays his purchase-money. But I say nothing as to the nature of the abstract which the tenant must deliver, or as to the nature of the title which he must deduce to his holding; these points have not arisen or been discussed in the present case.

FITZ GIBBON, L. J.:—

Towards the close of his judgment the Vice-Chancellor says that *Priestley and Davidson's Contract* (1) has no application to the present case, "as that was an ordinary sale of the interest of a statutory tenant, and not a case of pre-emption by a landlord under his statutory right." If this distinction be well founded, it must result from the fact that a better title can be given on pre-emption than on ordinary sale. I can find nothing in the Act to that effect. When a landlord exercises his right of pre-emption he becomes a purchaser, and the tenant is a vendor, in the same sense as as if they had made an agreement for purchase and sale. The tenant must be the owner of what he proceeds to sell; the landlord can pre-empt only what the tenant could otherwise sell to some other purchaser; the vendor must offer reasonable evidence of his title in both cases: that is the common lot of all vendors. The same Act which empowers the tenant to sell empowers the landlord to become the purchaser of what the tenant can lawfully sell, and of nothing else. The opposite conclusion

(1) 31 L. R. Ir. 122.

would enable tenants to give a good title to what was not their property, provided they gave it to their landlords. In my opinion the contention that the landlord should complete without evidence of title is answered by *Priestley and Davidson's Contract* (1).

The Vice-Chancellor says that "there could not be a valid transfer of the legal estate in the holding without the knowledge of the landlord, and claimants of any equitable interest or charge must have become so with full knowledge of the statutory right of the landlord. . . . I cannot see any grounds for the landlord's investigation of the tenant's title. If the transaction is carried out between him and his tenant, he will be entitled to be put into possession of the holding, and how could that possession be disturbed?" I agree with this *practically* in most cases; and to the fullest extent where the legal tenancy is vested in the person who is in occupation, and who pays the rent to the landlord. In that case the landlord will get the legal estate in the tenancy, and, if he takes it for value without notice, he will be safe from equities. But he must know, or be enabled to see, that he gets it, and these observations cannot apply to a case where the landlord does not know who is the legal tenant, or whether the person who pays the rent is the owner of the legal estate in the tenancy. In the present case the vendors are the executors of a person who remained in occupation after the expiration of a freehold lease, paying the same rent as was reserved by the lease, and the root of title offered is the fact that these executors have obtained an order fixing a fair rent upon the lands. That is no root of title at all. The title must be deduced from the leaseholder. The observations of the Vice-Chancellor as to equitable charges are limited to charges vested in persons who must "*have become*" the owners of them with knowledge of the landlord's statutory right of pre-emption. But there may have been any number of equitable charges and interests created in the present case, and affecting the leasehold, before the Act of 1881 first conferred the right of pre-emption on the landlord.

I was a member of the Court that decided *Farrelly* v. *Waller* (2). We decided in that case that the creation by the tenant of equities

(1) 31 L. R. Ir. 122. (2) 28 L. R. Ir. 122.

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against himself could not deprive the landlord of his right to buy; but we certainly did not hold that the tenant's equitable obligations would not attach on the purchase-money, and I said the contrary. Therefore, title to receive the money must be shown.

We do not enter on the question as to what will be a sufficient abstract of title for the tenant to furnish, or what requisitions may be reasonably made by the landlord. Between landlord and tenant, a good holding title can generally be shown more easily than between strangers, and though we hold that reasonable evidence of title must be shown, the landlord may, like many other purchasers, have to elect whether he will insist on strict proof of a marketable title, or will accept such evidence of title as the tenant can reasonably give, rather than break off the purchase, and thereby possibly set the tenant free to sell to a stranger.

WALKER, L. J. :—

I concur. The law of the land applicable to vendors and purchasers always has been that where a man proposes to sell land he must make out his title. If any change is introduced by the Land Law (Ireland) Act, 1881, it must be clearly shown. The material part of the 1st section of that Act is "the tenant for the time being of every holding . . . may sell his tenancy for the best price that can be got for the same, subject to the following regulations . . . the tenant shall give the prescribed notice to the landlord of his intention to sell his tenancy; on receiving such notice the landlord may purchase the tenancy for such sum as may be agreed upon, or in the event of disagreement may be ascertained by the Court to be the true value thereof." It is admitted that if the sale was made to a stranger, *Priestley and Davidson's Contract* (1) would be an authority that title must be made by the tenant in the ordinary way. There is nothing in the Act to show that the landlord is not to get the same title as an outside purchaser. The Act says the tenant "may sell his tenancy" in the market, subject to the right of the landlord to "purchase the tenancy." What the tenant may sell to a stranger and what the landlord may purchase under his right of pre-

(1) 31 L. R. Ir. 122.

emption is one and the same thing. Why should there be any difference in the rule as to making title in the two cases? Unless it were quite clear upon the statute I should not so hold. We simply answer, the landlord is entitled to be given an abstract.

HOLMES, L. J.:—

The arguments on behalf of the respondent cannot be accepted without introducing into the Land Law (Ireland) Act, 1881, provisions which it does not contain. That statute confers upon tenants valuable rights which they did not possess before, subject, however, as might be expected, to certain limitations and conditions. Amongst those rights is the right to sell the tenancy which is made for all practical purposes perpetual. The landlord, however, who is deprived of the right to put an end to the tenancy, and take up possession of the land at his own will, is given a privilege in lieu thereof; he is entitled, where the tenant desires to sell the holding, to purchase it at a price to be fixed by the Land Commission, if the parties themselves cannot agree upon the amount. The 1st section of the Act and the rules made thereunder, prescribe how this right of pre-emption is to be exercised; and upon the conditions therein laid down being complied with, the landlord and tenant are, in my opinion, placed in the same position as if they had entered into an agreement for the sale by the latter to the former of the tenancy. Such an agreement brings with it an obligation on the vendor to show title to the estate or interest which he has agreed to sell. I can find nothing in the statute to relieve the tenant from this duty. The arguments that have been addressed to the Court have been confined to two—first, the great expense of showing title, and second, the fact that the landlord himself must know whether the title is good or not.

But why should a person who presumably is receiving the full value of the tenancy be relieved from the ordinary expenses which are involved in a sale of an interest in land. The purchase-money is fixed on the assumption that the title is good, and that the landlord is to become the owner of the tenancy free from charge and incumbrance. No doubt the landlord may know more about the holding than a stranger. He knows who is in

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occupation and, perhaps, the time at which such occupation began. He also knows who has paid the rent; but he has no assurance that the tenancy is vested in the occupier and rent-payer; nor, without the usual searches, has he the means of ascertaining what charges affect the tenancy? What the landlord is entitled to receive in return for his money is an unincumbered tenancy; and in the absence of any provision in the statute to the contrary, I am of opinion that before he completes the purchase by payment of the price, he has the right which the law gives a purchaser of land on an open contract to see that he can acquire the estate he has bought. Strong reliance has been placed on *Farrelly* v. *Waller* (1), which was referred to by the Vice-Chancellor, although I do not think he makes it the foundation of his judgment.

I am unable to see how what was decided in that case affects the matter now before the Court. There was no question that the tenancy was vested in Farrelly, who served notice of his intention to sell, which was met by the landlord with a notice of his intention to exercise his right of pre-emption. It was held that the landlord had not lost this right by reason of the tenant having previously given certain equitable benefits out of the tenancy to his wife and daughters, and that the tenant was not at liberty to withdraw his notice of intention to sell.

It certainly was not held, and I do not think that any member of the Court intended to suggest, that a person claiming to be tenant, and taking the prescribed steps to sell the tenancy, could refuse to show his title to the landlord, upon the latter electing to purchase, or that the landlord could safely pay the purchase-money to the tenant, if he had notice of equitable charges affecting the holding, or if such charges were duly registered. In the present case, the root of the title is a freehold lease made more than sixty years ago, which did not expire until 1887. The premises may have been the subject of mortgage, marriage settlement, or other instruments of disposition, before the passing of the Act of 1881; and the right of pre-emption given to the landlord would be illusory, if he is not entitled to the usual facilities for investigating the title of the vendor.

(1) 28 L. R. Ir. 122.

I am of opinion, therefore, that the tenant must furnish an abstract of title; but I do not anticipate questions, glanced at during the argument, which if they arise at all can only arise upon or after the investigation of title.

As, however, we have heard so much on the subject of expense, I may be permitted to say that some requisitions which would be usual and reasonable where the purchaser is a stranger, would be unreasonable where he is the landlord. Indeed, the view presented on behalf of the tenant of the costs of deducing title seems to me to be greatly exaggerated. Assuming that there is vested in him the tenancy free from incumbrances, there ought to be no difficulty in his giving, at moderate cost, satisfactory evidence of this fact. Holmes, L.J.

Solicitor for the plaintiff: *Clarke.*
Solicitor for the defendant: *Ormsby.*

G. Y. D.

DEMPSEY *v.* WARD (1).

Graft—Over-holding tenant—Expiration of lease—Action to recover possession of land for non-payment of rent—Period of redemption expired—Receipt of money by evicted tenant on quitting the holding—Landlord and tenant—Judgment for possession—Non-joinder of party as plaintiff—Estoppel.

D., the lessee of a farm held under a lease for three lives (of which D. was the survivor) and an expired term of years, died in 1876 intestate, leaving a widow and nine children. After his death his widow remained in possession, and was accepted by the landlord as tenant from year to year of the farm, at the rent of £250. The farm was subject to a mortgage created by D. After the widow had been in possession of the farm for some years the rent was in arrear, and in April, 1886, an action to recover possession for non-payment of rent was commenced by A. as landlord, there being then two and a half years rent due. On the 3rd May, 1886, Mrs. D. gave a consent for judgment, and the writ of possession was executed on the 21st May.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, and HOLMES, L.JJ.

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B., a neighbouring farmer, agreed to give the landlord £400 for the farm. On the 16th December, 1886, an interview took place at the office of the landlord's solicitor between Mrs. D. and B., at which it was agreed that B. should pay to the landlord £400, out of which Mrs. D. was to receive £230. On the 15th January, 1887, an agreement between the landlord and B. was filed pursuant to sect. 8, sub-sect. (6), of the Land Law Act, 1881, fixing the judicial rent of the holding at £250. Mrs. D. remained in possession until July, 1887, when she was put out under a magistrate's order. W. H. D., one of the sons of the former tenant, who was a minor at the time of these transactions, brought an action against the specific legatee of B.'s interest and B.'s executors, claiming that Mrs. D.'s tenancy was a graft on the interest formerly held by her husband, and that B. having purchased her interest at (as alleged) a gross undervalue, his interest was a graft upon that of Mrs. D.:—

Held (affirming the decision of the Master of the Rolls), 1, that the interest of Mrs. D. in the lands having been determined, either by the ejectment or by surrender, there could be no graft; 2, that even if the doctrine of graft applied the action was wrongly constituted, as the mortgagee and the landlord should both be paid before the plaintiff could succeed; 3, that B. had not purchased Mrs. D.'s tenancy, but had obtained a new letting.

Prior to, and at the time of, the action to recover possession, the reversion in the lands had been conveyed to two persons, A. and B., on trust to collect the rents and manage the lands, one of whom only was plaintiff in that action:—

Held that, no objection having been taken to the non-joinder of the second reversioner in the action to recover possession, the judgment in that action was not void; and that at all events such an objection could not be relied on by the plaintiff to sustain the present action.

James Dempsey was prior to his death entitled to the lands of Killegland, in the county of Meath, comprising 192 acres, held under lease for lives and for a term of years. The term of years had expired long prior to 1876, and the last surviving life was that of James Dempsey the lessee. He died in 1876 intestate, leaving a widow, Mary Anne Dempsey, and nine children, all of whom were minors, and of whom William Henry Dempsey, the plaintiff was then seven years old. After the death of James Dempsey, his widow continued in possession, and was accepted as tenant of the lands at the rent of £250 per annum by the landlord Mark Aungier; but she did not obtain any grant of administration to her husband. There was a mortgage on the lands executed by James Dempsey to Baron J. Cohen for £400.

In 1882 Mark Aungier went to America, intending to remain some time; and before leaving Ireland he executed a deed dated

the 13th April, 1882, whereby he conveyed the estate to his brother Charles P. Aungier and John Aspinall upon trust to collect the rents, and to pay the interest on the mortgages and other outgoings, and the balance of the rents to himself.

After being in possession of the farm for some years Mrs. Dempsey fell into arrear with the rent; and in April, 1886, a writ of ejectment for non-payment of rent was issued by Charles P. Aungier as landlord against Mrs. Dempsey. On the 3rd May, 1886, Mrs. Dempsey gave a consent for judgment, and the landlord executed the *habere* on the 21st May, there being due at the time two and a-half years' rent (amounting to the sum of £625).

On the 16th December, 1886, an interview took place at the office of Mr. Davoren, the solicitor for Charles P. Aungier, the landlord, at which it was agreed that one William Bobbett was to be accepted as tenant by the landlord, to whom he was to pay £400 for the tenancy, and the landlord agreed to give Mrs. Dempsey £230 out of that amount. At that time Mrs. Dempsey owed another half-year's rent, making altogether £750.

Mrs. Dempsey remained in possession for seven months after this arrangement; and in the month of July, 1887, she was put out, and possession was taken by Bobbett under a magistrate's order. The plaintiff averred in the statement of claim that this transaction amounted to a sale for £400 by Mrs. Dempsey to Bobbett; and he stated that Mrs. Dempsey had not any independent advice on the occasion of the sale, and that the same solicitor acted for both Mrs. Dempsey and Bobbett; also that such sale was at a gross under-value.

On the 15th January, 1887, an agreement between Mark Aungier and William Bobbett was made and filed pursuant to sect. 8, sub-sect. 6, of the Land Law Act, 1881, fixing the judicial rent of the holding at £250. At that time a letter was written by the secretary of the Land Commission to Davoren as solicitor for the landlord, asking what the rent of the holding had been, and in answer a letter was written by Davoren dated the 27th January, 1887, as follows:—

"In reply to your inquiry, the amount of Mr. Bobbett's rent is that paid by the former tenant, Mrs. Dempsey, whose goodwill the former purchased."

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In January, 1888, William Bobbett died, having made his will and three codicils, of which probate was granted to the executors, Hubert C. West and William Bobbett, jun. By the third codicil he bequeathed the farm in question to his daughter Margaret Mary Ward, who had since been in possession of the farm.

The plaintiff, who was one of the sons of James Dempsey, left Ireland in 1887 and went to America, where he remained until November, 1896, when he returned to Ireland, but did not become aware of the nature of these transactions until the month of April, 1897. He obtained letters of administration to his father on the 23rd August, 1897, and brought the present action against Mrs. Ward and H. C. West and William Bobbett, jun., as executors of William Bobbett, praying for a declaration that the present tenancy subsisting in the lands was a graft upon the interest of the said James Dempsey in the lands; and also that the sale by Mrs. Dempsey of the tenancy to William Bobbett should be set aside as to two-thirds of the beneficial interest in the tenancy, and that the defendants should be declared to be trustees of two undivided thirds of the lands. The plaintiff also asked for an account of the rents and profits received by Bobbett or by the defendants since July, 1887, and for payment of two-thirds of the rents.

On the 18th of March, 1898, the Master of the Rolls dismissed the action with costs, and the plaintiff appealed.

Price, Q.C., *Matheson*, Q.C., and *Rosenthal*, for the appellant:—

The interest which Mrs. Dempsey had in the farm was a graft on the tenancy of her deceased husband. She paid his debts and remained in possession because she was the widow of the former tenant, and in the way she acted she made herself executrix *de son tort*. The letting to Mrs. Dempsey became part of her husband's assets. She then sold her interest to Bobbett for £400, but all that she was entitled to sell was one-third; the minor children were entitled to the other two-thirds. The farm was worth £1800. Bobbett's interest is a graft on the former interest, and the rights of the children could not be defeated: *Kelly* v.

Kelly (1); *M'Cracken* v. *M'Clelland* (2); *O'Brien* v. *Egan* (3); *Molony* v. *Molony* (4).

The judgment in the ejectment was void, because it was brought by one only of two joint tenants. One joint tenant can serve notice to quit, or distrain for rent, because he is the bailiff of the others; but all must join in an ejectment for the whole. In *Doe* v. *Chaplin* (5) it was held that three joint tenants could only recover three undivided parts. We also rely on *Doe* v. *Pearson* (6). The same rule applies to ejectment for non-payment of rent. At common law a joint tenant can bring an action for one moiety of the rent, or of the land: *Leigh* v. *Shepherd* (7); but there is no such thing as getting possession as bailiff. If the ejectment for non-payment of rent is brought in a wrong manner, it is *ipso facto* void: *M'Sheffry* v. *Doherty* (8). Since the Land Acts it is commonly known that a tenant will never take a future tenancy: what he always struggles to get is a present tenancy, and if he cannot get that, he will not purchase. It was agreed between the landlord and Bobbett, that Bobbett was to get a present tenancy, and this could only have been done on the basis that the tenancy had been in existence before 1881. But in addition to that presumption, there is also the evidence afforded by Davoren's letter of the 27th January, 1887, and the parol evidence of the two neighbours, Harvey and Bates, who stated that Bobbett purchased the farm.

The Right Hon. The MacDermot, *Q.C.*, *O'Connor*, *Q.C.*, and *Herbert Wilson*, for the respondent:—

There was no graft in this case, because Dempsey's tenancy terminated with his own life, and a new tenancy commenced then. That was before the Land Acts, consequently the tenancy was not an asset of James Dempsey's at all. Bobbett and those claiming under him were purchasers for value. The cases cited upon the doctrine of graft do not apply, because here the tenancy was

(1) I. R. 8 Eq. 403
(2) I. R. 11 Eq. 172.
(3) 5 L. R. Ir. 633.
(4) [1894] 2 I. R. 1.
(5) 3 Taunt. 120.
(6) 6 East, 172.
(7) 2 Brod. & Bing. 465.
(8) [1897] 2 I. R. 191.

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at an end by the judgment in ejectment. In all those cases, there was some lease or tenancy still existing. The objection to non-joinder cannot be taken after judgment by a stranger to the action.

March 21.

LORD ASHBOURNE, C.:—

This is an appeal from a judgment of the Master of the Rolls dismissing the action, and it presents some curious phases. Upon reading the statement of claim, one view is presented clearly, but anyone who heard the argument of the plaintiff's counsel in Court, and who afterwards read the statement of claim, would not consider there was much resemblance between the pleading and the case argued. The case put forward by the statement of claim states that a man named Dempsey, a farmer in the county of Meath, died in May, 1876, being possessed of certain lands called Killegland, containing 192 acres, which he held under lease for a term of years, which had expired, and for lives, of which he was the last survivor. He left a widow, Mary Anne Dempsey, and nine children. She continued in possession after his death, at the rent of £250, the former rent, and remained in possession till the month of July, 1887. It states that she was entitled to one-third of this tenancy for herself, and the children were entitled to two-thirds, as a graft upon the tenancy which had determined with her husband's life. The fifth paragraph states:—"In the month of December, 1886, the said Mary Anne Dempsey by an agreement in writing purported to sell the said tenancy in the said lands to one William Bobbett for the sum of £400," and the pleading states that there was fraud in the transaction, as the said Mary Anne Dempsey had not any independent advice and assistance on the occasion of the sale, that the solicitor for Bobbett acted for both parties on the occasion, that Mrs. Dempsey did not understand the full nature of the transaction into which she was induced to enter, and that the sale was at a gross undervalue, as the farm was worth a great deal more than £400. It then states that the plaintiff, one of the sons, went to America and only returned in 1896, that he obtained letters of administration to his father on the 23rd August, 1897, and that Bobbett died having left the holding to the defendant by his will.

The relief prayed for is that the present tenancy subsisting in the lands may be declared to be a graft upon the interest of James Dempsey, in other words that the mother's tenancy was a graft on the father's expired tenancy, and that Bobbett's tenancy was a graft on the mother's.

The statement of defence states that Bobbett became tenant in 1887, that he died in January, 1888, having left his interest in this farm to his daughter, the defendant, and she sets out the facts and circumstances of the sale. She states that what occurred was this—Mrs. Dempsey being indebted to Charles P. Aungier, the landlord, in the sum of £625, two and a-half years' rent of the lands, a writ of possession, issued on foot of a judgment obtained in an action of ejectment for non-payment of rent at the suit of Charles P. Aungier, was duly executed by the sheriff of the county of Meath, and possession of the lands was given thereunder to Mr. Aungier, and Mrs. Dempsey's interest determined. After the statutory period for redemption had expired Aungier demised the lands to Bobbett. The said Mary Anne Dempsey did not sell, or purport to sell the said tenancy in the said lands to William Bobbett; she had no interest in the lands to sell, and Bobbett did not purchase any estate or interest in the lands from her. The defendant further states that no such sum as £400 was paid by the said William Bobbett to Mrs. Dempsey, but the sum of £230 was given by Bobbett, who was apprehensive of being boycotted, to Mrs. Dempsey by way of gratuity, and in order to secure her good-will. It then states that subsequently to the ejectment Mrs. Dempsey remained for a period of about seven months as caretaker in care of the said lands, and in 1887 she was put out under a magistrate's order, and since then Bobbett has remained in possession.

There is a wide difference between the facts and circumstances as we now have them and the simple and innocent case put forward by the statement of claim. The first branch of the argument was the point presented to the Master of the Rolls—that there was a sale to Bobbett, that Mrs. Dempsey being in possession for her own interest sold to Bobbett, and that Bobbett must be regarded now as having the tenancy which is a graft upon hers. The Master of the Rolls seems also to have been pressed with the

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further point, although not in so much detail as it was pressed here, that the ejectment was void. The Master of the Rolls decided in favour of the respondent, and the case has been fully discussed before us on appeal. The counsel for the appellant have presented two broad branches of argument—(1), the question on the facts, that the tenancy was a graft on the old tenancy; and (2), the effect of the ejectment.

On the facts the argument addressed to us was this, that we ought to regard the substance of the transaction, that Bobbett had succeeded Mrs. Dempsey by virtue of the transaction with her, and that that transaction was handing over the interest or good-will, that it was a sale between Bobbett and Mrs. Dempsey, and that we were to ignore the fact that there was no evidence of a contract between Bobbett and Mrs. Dempsey. We were to pass that by because in Bobbett's will there is a statement that he purchased the farm from Mrs. Dempsey for £400, and because there is another statement in a letter written by Mr. Davoren to the Land Commission that Bobbett's rent was the same as the former tenant's, Mrs. Dempsey, whose good-will he purchased. That is, roughly speaking, the contention of the appellant as to how we should look at the case on the facts. I am not much impressed with the argument on the words of the will. The will is not well expressed, but the somewhat lax use of words by a testator cannot alter rights. As to the letter written by Mr. Davoren, that can scarcely affect the question. Bobbett was endeavouring to be a present tenant, but the idea seemed to have existed that he could not do this unless he was in the shoes of Mrs. Dempsey. But Holmes, L.J., drew attention to the form of the order made by the Land Commission. The Land Commission struck out all reference to the former tenancy, and made the order simply certifying that the agreement was filed declaring the fair rent of the holding. Upon the facts, and the evidence, and the probabilities of the case, I hold that this was a new letting from the landlord to Bobbett, and it was not a sale or transfer from Mrs. Dempsey to Bobbett. In the position in which things stood, Bobbett would go to the landlord if he wanted a new tenancy clear of any complication, and he would only go to Mrs. Dempsey if he wished to

have a transfer of the old tenancy with its obligations. On the evidence the arrangement made by Bobbett was with the landlord, and not with Mrs. Dempsey.

The question of graft plays a considerable part in the argument, but I am not going through all the cases on the doctrine of graft in detail. A man taking a new letting who is in a fiduciary position, that is one case; a man who is an executor taking a new letting, that is another; or a guardian of a minor, or a person who is a limited owner, and who gets the new letting by virtue of the position in which he stands in relation to the property; these are other instances in which the new letting has been held a graft. The case of *O'Brien* v. *Egan* (1) decided by the Vice-Chancellor is, without doubt, the strongest that can be found. But the facts of that case were quite different from those of the case now before the Court. There the person, to whom the new letting was made, was in possession of the holding, under the provisions of her husband's will, and on the expiration of the lease she obtained a new letting. That is very different from this case, where the term expired with the life of James Dempsey, and the landlord thought right to give the widow a new letting. But I do not rest my judgment on that. What did Mrs. Dempsey give Bobbett? If Mrs. Dempsey was there in possession of the old tenancy, and Bobbett purchased her interest, that would be another question, but that is not my reading of the facts. I hold that Bobbett came into possession by a contract with the landlord, that the £400 was paid under this arrangement to Mr. Charles Aungier, and it was quite legitimate to pay £230 to the widow not for her good-will, but for her good word.

Assuming the facts to be as I have stated, there is another question to be decided. Mr. Price and Mr. Matheson say you are leaning on a broken reed, the ejectment is void, because there were two joint tenants entitled to the reversion, and only one of them was joined as plaintiff in the ejectment. That is a strong way of putting the case, to suggest that there are several joint tenants entitled to the reversion, and the fact of one of them being

(1) 5 L. R. Ir. 633.

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omitted defeats the action, although the defendant did not raise the objection, or deny the plaintiff's right to recover. I can quite understand that in an ejectment for non-payment of rent, a defendant can say that a party ought to be added. But I am not aware of any case like this, where, after the lapse of twelve years, a person who was not a party to the ejectment comes forward to raise the point of non-joinder of a plaintiff. It is curious to consider what the result would be. What is the position and *status* of Bobbett, or of those who represent him? The contention would sweep away the tenant of the Aungiers, from whom they have been getting rent for eleven years, and affects their position without any notice to them, and without any representation to them in this action. Again it is sought to do this, though Mrs. Dempsey is not a party to the present action, while she was defendant in the ejectment. Then again, there is no notice to the landlord, although Mrs. Dempsey received £230 for her one-third interest in the holding. There is no case where such a thing was done after verdict and judgment, and after such a lapse of time. We have been familiar with Rules of pleading for ever so long, which have been passed for the purpose of preventing actions from being defeated from non-joinder of parties, and the matter was dealt with in the Rules of 1891 by Order XVI. R. 11, and yet we are asked to hold that this action of ejectment was void because one joint tenant was not added as a co-plaintiff. In my opinion, the question is one of title, rather than of jurisdiction. It is admitted that this single plaintiff could distrain, that he could give receipts for rent, and that he could serve a notice to quit. It is also admitted that he could bring an ejectment in his own name, if he acted for himself and others. In my opinion it would be indefensible for us to hold this ejectment to be void after such a lapse of time, and with some of the parties affected by it not before the Court, even if we held different views on the facts of the case.

Upon those facts I am entirely against the appellant, and in my judgment the decision of the Master of the Rolls is right, and should be affirmed, and the appeal should be dismissed with costs.

FITZ GIBBON, L.J.:—

I concur. In my opinion, the plaintiff fails on the form in which the action has been framed, on the equitable question of graft, on the legal determination of the tenancy, and on the evidence. Though I shall express my opinion on each of these matters, any one of them would be a sufficient answer to the action.

What is the nature of the suit? The plaintiff sues as the personal representative of James Dempsey the former tenant. One of the defendants, Margaret Mary Ward, is a legatee under the will of William Bobbett, and the two other defendants are his personal representatives. To sustain the action the plaintiff must, therefore, show title to something which is personal estate of James Dempsey. The claim is independent of heirship, and independent of devolution. Accordingly, before the plaintiff can succeed, he must show that the existing tenancy in the farm in question is an accretion to the personal estate of the late James Dempsey.

Furthermore, the claim is for two-thirds of the land *in specie*, and without terms of any kind. No one is brought before the Court who might have any equity, claim, or interest in or against the two-thirds of the land. No terms can be imposed except what Bobbett, if living, could have given. The landlord is not a party; Mrs Dempsey is not a party, and unless a clear and unconditional title is established by the plaintiff, the suit, as framed, cannot succeed.

In my opinion there are four fatal objections to the case of the plaintiff. 1. There is no proof that the tenancy which Mrs. Dempsey originally got was a graft on her husband's interest. 2. The tenancy which Mrs. Dempsey got from the landlord after her husband's death was determined before Bobbett came in. I think that it was determined by the judgment in ejectment; but if not, it was determined by Mrs. Dempsey by act and operation of law. 3. I agree with the Master of the Rolls that the evidence proves that Bobbett became tenant and got possession, not by purchase from Mrs. Dempsey, but by direct contract with the landlord; and, 4. The new letting to Bobbett was not grafted on anything which had gone before, but became a new root of title.

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The only difficulty which I feel upon this part of the case arises on the language of Mr. Davoren's letter of January 27, 1887.

Not for the first time, I have to observe that I entertain grave doubts as to the extent to which the doctrine of graft has been pushed in this country. The use of the term "graft" is peculiar to Ireland. English Judges have found fault with our Irish use of the terms "graft" and "salvage" to designate separate heads of equity; they object to metaphor, and prefer to speak of "derivative equities." The terms have been used for a long time in Ireland; they happily express what is meant, but their use ought not to extend the doctrines of equity. To have a graft at all, there must still be life in the old stock. The vital principle of all the cases is to be found in *Keech* v. *Sandford* (1), where a trustee took a renewal of a lease for his own benefit, the lease being vested in him as guardian of an infant, and it was held that he could not hold the renewal against his ward.

In *Kelly* v. *Kelly* (2) the personal representative took possession of a tenancy from year to year, and though an ejectment was brought, and possession was formally taken, the administratrix continued to occupy at the same rent, and was held to be in the same position as a trustee purchasing part of the trust property for his own benefit, and therefore incapable of acquiring beneficially for himself.

In *M'Cracken* v. *M'Clelland* (3) the executor actually surrendered the holding to the landlord, while the old tenancy was in existence, and in compliance with the custom of the estate he was given the new tenancy because he was an old tenant. In other words, he gave up part of the assets as the consideration for the new tenancy. This was the same case as *Randall* v. *Russell* (4).

Then came *O'Brien* v. *Egan* (5). With all respect, I treat that as, at best, a frontier case: whether it goes beyond the true line, it is not necessary now to decide. But whenever it comes to this Court for decision, it will be open to serious question whether the argument of Serjeant O'Hagan was sufficiently answered. Where a specific piece of property, such as a tenancy for a fixed term,

(1) 1 Wh. & Tud. L. C. 48.
(2) I. R. 8 Eq. 403.
(3) I. R. 11 Eq. 172.
(4) 3 Mer. 190.
(5) 5 L. R. Ir. 633.

which is subject to certain rights, comes to its natural end, and ceases to exist, I shall require argument to satisfy me that a person who had an interest in what so came to an end, is under any disability, or is subject to any equity, which will affect him in an honest dealing for a new interest, in any way in which a stranger would not be affected. That does not seem to me to be the case of grafting on an old stock, but of acquiring or planting a new root. But, however that may be, all that it is now necessary to say of *O'Brien* v. *Egan* (1) was well expressed by Holmes, L. J., in the course of the argument: "there is a chasm between that case and this." In *O'Brien* v. *Egan* (1) there had been a continuing possession of the property which was surrendered. Here it is not even alleged, far less proved, that Mrs. Dempsey originally got into possession through her husband. The statement of claim alleges that James Dempsey was entitled to the lands of Killegland held under a lease for years and lives made prior to the year 1870. It then states—"The term of years had expired long prior to his death, and the surviving life was that of the said James Dempsey. Immediately *after* the death of the said James Dempsey, the said Mary Anne Dempsey *entered into possession* of the said lands, and *was accepted* by the landlord thereof, one Mark Aungier, as, and *became tenant* of the said lands at the yearly rent of £250, and remained in possession thereof as such tenant *from the said 1st May*, 1876, down to the month of July, 1887."

It is not stated that Mrs. Dempsey was an over-holding tenant, or that she became tenant on the terms of the expired lease; or that she was accepted through any consideration of her relationship to James Dempsey, or that she took advantage of her relationship in any way. The statement of claim alleges no equity against her, and none has been proved.

In my opinion, where a tenancy has ended, and where it is in the power of the landlord to make a new letting to whomsoever he chooses to accept as tenant, there is no necessary disability attaching to the members of the family of the previous tenant, which, *per se*, and without more, prevents any one of them from taking and keeping a new tenancy, unencumbered by grafts or

(1) 5 L. R. Ir. 633.

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equities which would not affect other people. It is every day's experience. The tenant for his own life dies: if the landlord likes, he can turn the family out on the spot. The widow and sons go to the landlord's office, to see whether he will accept one or more of them, to succeed the old tenant. He may prefer the widow, because she is thrifty and industrious; or because the children are young. Or he may prefer the eldest son, because he is likely to work the farm well, or even because, if it was a freehold before, he wishes the son to succeed the father as a freeholder. Or he might prefer the second son, either because he was a better man than his eldest brother, or because the elder brother already had another farm. What equity is there, in such cases as those, in "grafting" liabilities, or disabilities, on new tenancies? The first effect of such a graft must be to make the grafted interest assets of the late tenant, and to bring in the creditors even before the beneficiaries. It appears to me that there is a "chasm" between such cases and the principle of *Keech* v. *Sandford* (1), and in the present case I find nothing to connect James Dempsey's tenancy with his widow's tenancy, except that she was his widow, and was living in his house when his tenancy ended by his death.

As to the second question—Whether the tenancy was determined?—I think the ejectment determined it. In *M'Sheffry* v. *Doherty* (2) we were driven to hold that the ejectment was void. There was a mortgage of the interest supposed to be evicted, which was admittedly still existing. The pleading was wrong; it deliberately omitted part of the demised lands; and parties not bound by the ejectment were still interested in, and were in possession of, those lands. The existence of the mortgage, and the continuance of the demise in the outstanding lands, were alike incompatible with the validity of the eviction. No such difficulty arises here; the plaintiff who sued and recovered in the ejectment was in the position of bailiff for the co-owners, and it does not lie in the mouth of any party to the proceedings to say that the possession was not recovered by him for himself and his co-owners. But, at all events, there was sufficient evidence to satisfy sect. 24 of the Landlord and Tenant Act of 1860, that the plaintiff in the

(1) 1 Wh. & Tud. L. C. 48. (2) [1897] 2 I. R. 191.

ejectment was the landlord of the defendant, and in an ejectment brought by a landlord by estoppel against a tenant by estoppel, it cannot, in my opinion, be open after judgment to treat the eviction as void, merely on the ground of non-joinder of parties.

Besides, Mrs. Dempsey put an end to any tenancy with which she was capable of dealing, by act and operation of law.

The third question is one of fact. The whole dealing was between Bobbett and Mr. Aungier. The widow had become a permissive occupant; she could be put out by a magistrate's order; and Bobbett undertook to give her something, not for her tenancy, but for her "good-will." The suggestion that the tenancy was sold for less than it was worth is unfounded. The new letting to Bobbett was independent of the previous caretaker's occupation. It ought not to be lost sight of that the tenancy which Bobbett got was not one to which the advantages of a "present tenancy" attached. Care was taken to make it clear that what Bobbett purchased was an evicted farm, and not a subsisting tenancy, and therefore he got it cheap.

Lastly, an attempt to graft an equity on this new tenancy of Bobbett's would at once bring the parties seeking the equity under the obligation of doing equity by paying the mortgage that has been referred to, and discharging all the other liabilities of the deceased tenant. If the plaintiff here could succeed at all, he could do so only in a suit bringing the landlord, Bobbett's representative, and the mortgagee, all before the Court, and offering to pay the landlord his rent, the mortgagee his debt, and to take a fair account with Mrs. Dempsey of the rents and profits.

In my opinion, the action wholly fails, and the appeal must be dismissed with costs.

HOLMES, L.J. :—

It does not often happen that a case comes into this Court in which the plaintiff fails so completely in both law and merits as in the present instance. Objection has been taken to the action on the grounds that the proper parties are not before the Court, that the relief claimed has been misconceived, and that there are other defects of a comparatively minor character. I do not stop to examine these defences, inasmuch as the plaintiff's cause of action

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depends upon his establishing two propositions neither of which can be sustained. The foundation of his alleged right is that the letting of Killegland to Mary Anne Dempsey on the death of her husband created a tenancy which became at once part of the husband's personal estate. I am clearly of opinion that it did not. James Dempsey the husband had a freehold lease of these lands which terminated with his life. His wife went to Liverpool to see the landlord and obtain from him a new letting. She asked for a freehold lease which the landlord declined to give, but he made her tenant from year to year. There was no intention on either side to increase the assets of the deceased. There was no trust declared. Neither the widow, nor any one else, except the landlord had any interest, legal or equitable, in the land; and when she applied to be made tenant, she had never occupied any fiduciary position in relation to it. The doctrine recognised in *Keech* v. *Sandford* (1) has been pushed in some instances very far, but it is impossible to apply it in the present case. The landlord was probably influenced in making the letting by a desire to benefit the widow of an old tenant; but, if so, it was a personal benefit he wished to confer on her, and not to create an interest that might be laid hold of by the creditors of the deceased.

On this ground alone the action must fail. But even if Mrs. Dempsey became a trustee for everyone interested in her husband's assets, the letting made to her has long since come to an end; and the tenancy to which the defendants are now entitled is a new and different interest. There has been a good deal of argument as to the nature and effect of the transactions which led to William Bobbett becoming the tenant; but the inference from the evidence is clear: *res ipsa loquitur*. Mrs. Dempsey fell behind in her rent; and in May, 1886, she owed on account of it £625. Her interest in the land was valuable; and the first idea of the landlord was to sell it under a judgment to be obtained by him for the amount due; but it was discovered that the sheriff would not have been able to seize the tenancy under a writ of *fieri facias* on account of a mortgage that affected it. A judgment in ejectment for non-payment of rent was then obtained; and

(1) 1 Wh. & Tud. 48.

when the writ of *habere* was executed, one of Mrs. Dempsey's sons was made temporary tenant pending the period of redemption. I have no doubt that she would have sold while there was yet time, if she could have got a purchaser willing to give a price that would cover the rent due and the mortgage debt; but none such was to be found, and as there would have been no advantage in a sale for a smaller sum, the period for redemption was allowed to expire, and the tenancy came to an end. When the landlord was proceeding to take possession, Bobbett turned up. He was willing to give £400; but I have no doubt that he would only give it to the landlord on getting the land from him. He is dead himself; but the landlord's solicitor, Mr. Davoren, tells us what happened when the arrangement was made. The £400 was paid to the landlord, and it was left to the latter to say what sum he would give as a matter of charity to the former tenant. The amount was fixed by him at £230; and this she got, not as the purchase-money of her tenancy which was gone, but for the purpose of obtaining the personal good-will of herself and her family.

It has been argued that the ejectment was a nullity because the reversion expectant on the tenancy was vested in two trustees jointly, and only one of them was named the plaintiff. He could, however, have given a good discharge for all the rent; and I doubt if the tenant could have taken advantage of the non-joinder of the other even before judgment. In any case, I am of opinion that it was too late to raise this objection years after judgment and execution. Besides, if the tenancy was not determined, the arrangement I have mentioned amounted to a surrender of it by Mrs. Dempsey.

It was part of the arrangement between the landlord and Bobbett that the latter should be given a statutory tenancy; and this is the only thing which affords some shadowy reason for saying that Bobbett had purchased the old tenancy. The usual form of agreement was altered by striking out all reference to an old rent or to a present tenancy; and nothing appears upon the face of the document to show that before its date any tenancy existed in the holding. It is, however, argued that inasmuch as such an agreement could only have been entered into when the tenancy had been in existence before 1881, it must be now assumed that this

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tenancy was of that duration. The cases, however, which decided, or are supposed to have decided, that a landlord and tenant could not create a present tenancy by agreement did not arise until long after this transaction; and at that time it was not unusual to have a fair rent fixed by consent on the creation of a future tenancy. I cannot hold that the subsequent judicial determination of a doubtful point of law can throw any light on the real nature of a previous transaction. Neither do I attach any importance to Mr. Davoren's letter to the Land Commission which, in my opinion, does not bear the construction sought to be placed upon it.

For these reasons I hold that the plaintiff has failed to establish either of the propositions which are necessary for his course of action.

Solicitor for the plaintiff: *Rosenthal.*
Solicitor for the defendant: *Davoren.*
Solicitor for the executors of William Bobbett: *Deverell.*

R. D. M.

M. R. 1899. June 7, 13,

IN RE JOHN HODGES, DECEASED.

HODGES *v.* HODGES.

(1897. No. 944.)

Administration—Executors—Assets of testator—Power of executors to carry on business—Right of executors to indemnity—Rights of creditors of testator and subsequent creditors of executors.

A testator's business was carried on for about two years after his death by his executors in accordance with a power in his will, and afterwards, by leave of the Court in an administration proceeding brought by the executors for their own protection, until the business was sold by order of the Court. Considerable liabilities were incurred by the executors in carrying on the business, and the assets were insufficient to pay both the creditors of the testator and the creditors of the executors. The creditors of the testator, who were chiefly members of his family, were aware that the business was

being carried on, not for the purpose of selling it as a going concern, but in the hope of realizing a fund sufficient to pay them in full, and did not interfere:—

Held, that the testator's creditors must be taken to have assented to the carrying on of the business, and that the executors were entitled, in priority to the testator's creditors, to be indemnified out of the assets in hand against the liabilities incurred by them in carrying on the business.

Dowse v. *Gorton* ([1891] A. C. 190) and *Brooke* v. *Brooke* ([1894] 2 Ch 600) followed and applied.

ADJOURNED SUMMONS.

This was a proceeding commenced by originating summons to administer the real and personal estate of John Hodges, deceased. On further consideration a question of priority arose between the creditors of the testator and the creditors of the executors, who incurred debts in carrying on the business of the testator in accordance with a power contained in his will, the assets being insufficient to pay both. The facts of the case and the arguments of counsel appear from the judgment.

Brunskill, for the plaintiffs.

Garrett Walker, for Grace Hodges and Sophia Hodges, creditors of the testator.

Blood, *Q.C.*, and *Chaytor*, for creditors of the executors.

John Leech, for the defendant.

The following authorities were cited:—*Dowse* v. *Gorton* (1); *Brooke* v. *Brooke* (2); *Kidd* v. *Kidd* (3): *Morris* v. *Latchford* (4).

THE MASTER OF THE ROLLS:— June 13.

The question raised in this case is one of importance to the parties interested, but it has been brought before me without much evidence as to the facts; of this I have some reason to complain, and if the case goes further this may be a difficulty in the way of the successful party. John Hodges, the testator,

(1) [1891] A. C. 190.
(2) [1894] 2 Ch. 600.
(3) 70 L. T. (N. S.) 648.
(4) 23 L. R. Ir. 333.

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carried on business as an ironmonger in Westmoreland-street and Aston's-quay in the city of Dublin, under the name of Hodges & Sons. At the time of his death, which took place in September, 1895, his estate is said to have been insolvent, or, if not, nearly so. By his will, dated June 26, 1895, he bequeathed to the present plaintiffs, whom he appointed his executors and trustees, his houses in Westmoreland-st., Aston's-quay, and Price's-lane, or other the premises in which he carried on his business, and the stock-in-trade, trade debts, and business carried on therein, upon trust either to carry on the business or sell the same. He charged the business, if carried on, with annuities for his wife and daughters; if sold, he directed the net proceeds of sale to be held on trust for his wife and children, and devised the residue of his property to his wife. The plaintiffs proved the will, and carried on the business after the testator's death until November, 1897, when they took out an originating summons to administer the real and personal estate of the testator, being unable to trade any longer owing to heavy family charges amounting to above £3900, and debts due by the business. Mrs. Hodges, the widow of the testator, was made a defendant; and on November 22nd, 1897, the usual order for administration was made. A receiver and manager of the business was appointed by order of December 13th, 1897, and pursuant to that order the business was afterwards sold as a going concern, and the proceeds of sale brought into Court.

The case came before me on May 15th of the present year on further consideration. It appears from the chief clerk's certificate that the debts of the testator remaining unpaid amounted to £1824 19*s.* 1*d.* By far the larger portion of this amount is due to members of the testator's family, namely, £986 3*s.* 1*d.* due to Mrs. Jane Louisa Hodges, widow of George Hodges, a brother of the testator, who had been a member of the firm of Hodges & Sons, and £600 due to Miss Sophia Hodges, the personal representative of Mrs. Anne Sophia Hodges, the mother of the testator. They were represented before me by Mr. Walker. The rest of the £1824 19*s.* 1*d.* is made up of small sums which would appear to be trade debts. No one appeared for these trade creditors. The plaintiffs carried on the trading, as I have said, and in the course of it paid off a considerable amount of debts, and incurred further

liabilities. There is no allegation against them of misconduct. They appear to have done their best. The result, however, of the trading has been that instead of realising a fund which would have made the estate solvent, the business became further indebted. This is a result which, in my experience, almost always follows under similar circumstances: and the certificate finds that the amount due to the creditors of the executors on their trading is £3442 9*s.* 2*d.* As the accounts show, there will not be enough to pay both the old and the new creditors. If the new creditors are paid first, there will be nothing left for the old creditors. When the case came before me on May 15th I reserved for further argument the question of the priority *inter se* of these two classes of creditors. On the argument no one suggested that the old and new creditors should abate rateably; the question is simply, which of the two sets of claims should be paid in priority?

How does the law on this subject stand? It has been so recently considered by the House of Lords in *Dowse* v. *Gorton* (1) that it is unnecessary to refer to the earlier cases, nor does the law as there laid down raise any difficulty. The difficulty, if any, is one of fact. The ordinary rule is that no matter whether a testator has directed his executors to carry on his business or not, the right of his creditors to be paid out of the assets existing at the testator's death is paramount. The creditor of the testator cannot be compelled to postpone his legal priority in favour of anyone. He has no specific lien on the assets; but he has a right to intervene either by proceeding against the executors by what used to be known as a common law action, or by an action in the Chancery Division for administration, or otherwise. The right of the creditor is to have the assets existing at the death of the testator dedicated to the payment of his debts, and the executors and legatees or next-of-kin must look out for themselves. If the executors do not discharge their duty properly the creditor has a personal remedy against them also. If the testator gives directions to his executors to carry on his business, and it is carried on by them at a loss, that will not fall on the creditors, and they

(1) [1891] A. C. 190.

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are entitled to ignore any directions in the will, and take their remedy against the assets as they were after death. But this right of the creditor, like any other right, may be prejudiced or lost by acquiescence or neglect. If, for example, a creditor is aware that in derogation of his rights the business is being carried on, and stands by and allows the executors to incur personal liability, he will be held to have acquiesced, and so be estopped, as against the claims of new creditors. The way the matter is worked out is this. The executors, if they carry on the business by virtue of a direction in the will of the testator, are entitled to be indemnified against the claims of creditors to the extent of the net assets of the testator received by them. The claim is sometimes made by the executors. They say, We have paid the *post* creditors, and are now entitled to an indemnity out of the assets. The claim, however, may be made not by the executors, but by the *post* creditors themselves, who come against the assets directly, thus avoiding circuity of action.

The present proceedings are brought by the executors of the testator; but nothing turns on that. The question of priority is really between the two classes of creditors. The executors were adjudicated bankrupts, and could not, and did not, pay anything on foot of these debts; but no point was made as to this.

The question simply is, to which category does the present case belong? Is it simply a case of creditors claiming against assets, untrammelled by any circumstances connected with the carrying on of the testator's business; or is it a case where the creditors have forfeited their rights by laches or acquiescence, having allowed the executors to continue the trading under such circumstances as would make it inequitable to allow them now to put forward their claims against the assets in priority to the claim of the executors to be indemnified? It is with reference to this point that I stated that very little evidence had been brought before me. Dealing, however, with the facts as I find them, Sophia and Jane Hodges, the two largest creditors of the testator, are, as I have pointed out, members of his family. This fact of itself would not fix them with notice of what was being done by the executors. But I was asked to infer that being the two largest creditors, and one of them living in the immediate neighbourhood

of Dublin, they knew what was going on. I am certain, so far as I can be without any express statement to that effect on affidavit, that they did know what was going on; and Mr. Walker, who appeared for them, admitted that they knew that the business was being carried on, though not the exact circumstances of the case. But for this, I should have required their attendance for cross-examination on the point. They, of course, knew of the death, which took place in September, 1895. It further appears that on June 30, 1896, a mortgage was executed by the plaintiffs to Sophia and Jane Hodges, to secure the sum of £600, and though it is stated that this deed was afterwards repudiated, it is important as showing the knowledge of the parties of what was going on. It is made between Leonard Maddison Hodges and Henry Cranfield Williams, who are described as both of 16, Westmoreland-street, ironmongers, of the first part, Sophia Hodges of Easton Lodge, Monkstown, in the county of Dublin, administratrix, with the will annexed, of Anne Sophia Hodges, deceased, of the second part, and the said Sophia Hodges, and Jane Hodges, of Wellington Lodge, in the county of Berks, of the third part. This shows that Sophia and Jane Hodges knew that the plaintiffs were carrying on business as ironmongers. In the operative part of the deed they purport to convey, as beneficial owners, the premises in Westmoreland-street and Aston's-quay, stated to be the property of Leonard Maddison Hodges and Henry Cranfield Williams, to secure £600. That leaves no doubt on my mind that Sophia and Jane Hodges learned that the business was being, and would be, carried on by the executors, and the mortgage shows that it was intended that there should be a certain permanency in the carrying on of the business.

These circumstances do not apply to the other creditors of the testator, a tolerably numerous body, though their claims are individually small. It was not until more than two years after the death of the testator, namely, on November 19th, 1897, that proceedings were taken by the plaintiffs by way of originating summons to administer the estate of the testator, and a decree followed immediately upon it.

In *Dowse* v. *Gorton* (1), the opinions were given by Lords

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Herschell and Macnaghten. In that case, the testator empowered his executors to continue any business he might be engaged in at the time of his death. Lord Herschell, at p. 199, says:—"I think it is clear that where a business has been carried on under such an authority as was conferred upon the executors by the will of this testator, they would be entitled to a general indemnity out of the estate as against all persons claiming under the will. But I take it to be equally clear that they could not, by reason only of such authority, maintain this right against the creditors of the testator. The executors would, no doubt, be entitled to carry on a business of the testator for such reasonable time as was necessary to enable them to sell his business property as a going concern, and would even, as against his creditors, be entitled to an indemnity in respect of the liabilities properly incurred in so doing. But, in the present case, the business was carried on for a period of three years, and it is obvious that this was not done merely for the purpose of effecting a sale. I agree with the contention of the learned counsel for the appellants, that the mere fact that a creditor stood by, under such circumstances, and did not immediately take steps to enforce his debt, would not of itself entitle the executors, as against him, to be indemnified out of the estate. But when all the circumstances of the case are considered, I do not think this is the true view of them. It is necessary to look somewhat closely at the position of affairs at the time of the testator's death, and at what took place afterwards. Three of the annual instalments of £1500 each were overdue, and, although a balance sheet was exhibited to the appellants which disclosed a large surplus, it was, on the face of it, shown to be arrived at by valuing all the business premises and machinery at cost price. Any business man must have known, not only that this would be wholly different from the breaking-up price, but that it did not afford any real measure of what could be obtained if sale were of a going concern, to say nothing of the uncertainty of finding a purchaser for such a subject. I do not place any reliance upon the allegation, denied by the appellants, that they informed one of the executors that the business had better be continued."

Lord Herschell then refers to the terms of the agreement under

which the debt was incurred and says that the proper inference was that the businesses were carried on, with the assent of the creditor, for the purpose of securing the payment of the debts. At p. 201, Lord Herschell, adds:—"Since writing my opinion I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Macnaghten." Lord Macnaghten, at p. 203, says:—"My Lords, there is not, I believe, a shadow of authority for such a claim as that put forward by the appellants. It is contrary to all principle. Creditors of a deceased trader whose business has been continued by his executors, when they come for an administration decree, must treat the continuance of the business either as proper or improper. If the business has been properly continued as between the executors and the creditors, or if the creditors choose to treat it so, which comes to the same thing, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on. If it has been improperly continued, and the creditors choose to treat the continuance as improper (which of course they are not bound to do), they may proceed in the proper way, to make the executors accountable for the value of the assets used in carrying on the business, and they may also follow the assets, and obtain a charge on the business in the hands of the executors for the value of the assets misapplied, with interest thereon; and they may enforce the charge, if necessary, by means of a receiver and a sale. Then there can be no room for any claim to indemnity on the part of the executors. The charge in favour of the trust estate must be satisfied first. The executors can only take what is left. Though they are not bound by what they do in ignorance, and may, by leave of the Court, sue in respect of wilful default after having taken the usual order, they cannot approbate and reprobate in one breath. They cannot claim the assets of the business as a going concern in the state and condition in which these assets happen to be at the moment where they choose to intervene, and at the same time refuse the executors indemnity in respect of liabilities incurred in carrying on the business."

The question then is, have the creditors of the testator here lost their right to prior payment out of his assets? That is, I think, the fair way of putting it, although, Kekewich, J., in

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Brooke v. *Brooke* (1), to which I shall presently refer, seems to put it the other way. I should say that the onus is on those who oppose the claim of the creditors of the testator. The dates in the present case are important. The testator died in September, 1895, but the present proceedings were not begun for more than two years afterwards, namely, in November, 1897. There is nothing to justify me in inferring that it was carried on for this length of time for the purpose of selling it as a going concern. No attempt was made during those two years to sell the business. Could anyone suppose that the shop was kept open simply in order to sell the business as a going concern? Could any one creditor of the testator, whether a member of his family or not, suppose so? It has been carried on since the order for administration by leave of the Court until the sale took place, but no application was made to declare the priority of the testator's creditors till now. I do not attach much importance to the time which has elapsed since the commencement of these proceedings; I think that the delay prior to the commencement is far more important.

In *Brooke* v. *Brooke* (1), which was a decision of Kekewich, J., the dates were as follows:—The testator, who carried on a paper mill, died on September 6th, 1888. His will contained no direction to carry on the business, but it was, in fact, carried on by his widow, his executrix, until November 29th, 1889, when an order for administration was pronounced in an action brought against the widow by two daughters of the testator, who, besides being beneficiaries under his will, were also creditors of his estate for sums advanced by them to him in his lifetime. The widow was appointed receiver and manager, and another person was afterwards appointed in her place. The principal creditor, whose debt was found by the certificate, claimed £1800 under a bond, and was also a mortgagee of the property, in respect of other sums. There were certain other debts also found by the certificate. Considerable liabilities had been incurred in carrying on the business. It was not till August, 1894, that the question of priority came before the Court, and the mill was still being carried on. Keke-

(1) [1894] 2 Ch. 600.

wich, J., at p. 607, says:—"In a case of this kind, where, after the death of a trader the business is carried on by the executor for some time, and then ultimately there is a conflict between the creditors, properly so called, of the testator, and the creditors of the business, that is, of the executor who carried on the business out of the assets of the testator, then it is for the creditors of the business to show, if they can, that the business was carried on with the assent of the creditors of the testator, or for the creditors of the testator to show the contrary. The creditors of the testator have their own remedy: they can step in at any time. They must be presumed to know of the death of the testator, and that the business is being carried on by the executor, and the law says that that cannot be done without their assent. Therefore, if they have not interfered, they must be treated as having assented, and the indemnity of the executrix follows by reason of their assent. These views are, though I have expressed them in my own language, what I understand to be the result of the decision in *Dowse* v. *Gorton* (1). Accordingly, it is for the Court, in every case, to consider what is the proper inference to be drawn from the facts. Now, is there here any reason for inferring that the business of the testator was not being carried on by his executrix, with the assent of the creditors of the testator? I find none whatever: because the only creditor now resisting the claim of the executrix to an indemnity is a creditor who knew perfectly well—at all events after the date of the judgment in this action—that the business was being carried on in this particular way. I should be prepared to infer that he knew that fact long before the judgment. At all events he knew it within two months after the judgment. He had notice as a mortgagee, and therefore cannot say he did not know as a creditor. He knew, in January, 1890, that the business was being carried on. Accordingly, I have no difficulty in holding, as to this particular creditor, that this business was being carried on by the executrix with his assent." The learned Judge then goes on to the other point, as to assent to the carrying on of the business by the receiver, and comes to the conclusion that the

(1) [1891] A. C. 190.

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particular creditor must be regarded as having assented to the business being carried on, first by the executrix, and then by the receiver, and that the executrix was entitled to an indemnity, according to the principle of *Dowse* v. *Gorton* (1).

I am of opinion that, although the facts of that case are not identical with the present, I am bound by a decision from which no appeal has been taken, and accordingly I come to the conclusion that the creditors of the testator must be taken to have known of and assented to the business being carried on, and for a length of time which precluded its being suggested that it was carried on only for the purpose of selling it as a going concern. The executors, according to the ordinary rule, were bound to wind up the estate within a year from the testator's death, though, of course, under special circumstances, they might be justified in carrying on the trading longer. They did, however, carry it on much longer; and it must, I think, be assumed that the creditors of the testator knew that it was being carried on with the honest hope that they would be paid in full. I must, therefore, declare that the creditors of the executors are entitled to be paid in full in priority to the creditors of the testator.

Solicitors for the plaintiffs: *Read & Mac Nab.*
Solicitor for Sophia and Jane Hodges: *R. H. Beauchamp.*
Solicitors for creditors of the executors: *Hayes & Sons.*
Solicitor for the defendant: *W. S. Cornwall.*

W. L.

(1) [1891] A. C. 190.

HARRIS *v.* LOFTUS.

(1898. No. 1363.)

V.-C. 1899.

June 8, 9. July 6.

Will—Construction—Issue—Legacies to be settled on marriage on daughters, and on their demise on their issue—Issue read children.

A testator bequeathed to each of his four unmarried daughters £10,000 New Government Stock, to be paid and assigned to each as a marriage portion on their respective marriages, and £20,000 Old Government Stock, to be settled on each marriage strictly on his said daughters, and on their demise on their lawful issue, share and share alike, not to be subject to the control of any husband his daughters might marry, and in case any of his said daughters dying and leaving no lawful issue to attain twenty-one or get married, then such share of old stock to be divided, share and share alike, between the survivors of his said four daughters:—

Held, following *In re Dixon's Trusts* (I. R. 4 Eq. 1) and *In re Denis' Trusts* (I. R. 10 Eq. 81) that the word "issue" should be restricted to children.

ORIGINATING SUMMONS.

Robert Fannin made his will dated the 14th December, 1841, and thereby bequeathed to trustees £80,000 old 3½ per cent. Government Stock, and £40,000 new 3½ per cent. Government Stock for the purposes thereinafter named, that was to say, and the testator continued, "I leave to and bequeath unto each of my four unmarried daughters, viz. Martha, Maryann, Margaret, and Catherine Fannin, the sum of £10,000 new 3½ per cent. Government Stock to be paid and assigned to each as a marriage portion on their respective marriages, and £20,000 old 3½ per cent. Government Stock to be settled on each marriage strictly on my said daughters, and on their demise on their lawful issue share and share alike, not to be subject in any manner to the control or management of any husband my said daughters may at any time marry, and in case any of my said four daughters dying and leaving no lawful issue to attain the age of twenty-one years, or get married, then such share or shares of £20,000 old 3½ per cent.

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to be divided share and share alike between the survivors of my said four daughters."

The testator died in January, 1843, and his will was proved.

One of the daughters, Margaret Fannin, married the Rev. Lord Adam Loftus, and by her marriage settlement dated the 10th June, 1846, and to which the trustees of the will were parties, and which, amongst other matters, recited the bequest of her £20,000 Stock, and an agreement that a sum of 3¼ per cent. Stock then representing the same should remain invested in the names of the trustees of the will upon the trusts thereinafter, in conformity with and in execution of the directions of the testator, expressed and declared concerning the same, it was declared that the said trustees should hold the said sum of stock upon trust during the joint lives of Lord Adam Loftus and Margaret Fannin to pay the interest and dividends thereof to Margaret Fannin for her separate use, and after the decease of Lord Adam Loftus in case Margaret Fannin should survive him to permit her and her assigns to receive such interest and dividends during her life for her sole use and benefit, and not to be subject to the control or management of any husband she might thereafter marry, and after the decease of Margaret Fannin in case such decease should happen in the lifetime of Lord Adam Loftus, then, as to the principal sum of stock, and the interest and dividends thenceforth, in trust for all and every the child and children of Lord Adam Loftus and Margaret Fannin equally between them, if more than one, share and share alike; and, if but one, the whole to such child, but in case Margaret Fannin should survive Lord Adam Loftus, then, after her decease, as to the said principal sum and the interest and dividends thenceforth to arise therefrom, in trust for all and every the child and children of Margaret Fannin by Lord Adam Loftus and any other husband or husbands equally between them, if more than one, share and share alike; and if there should not be any child or children of Margaret Fannin by any husband, or there being such, he, she, or they should die under the age of twenty-one years and without having been married, then, in trust for all and every the person or persons who, upon such contingency happening, should under the said will be entitled to the same.

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Lord Adam Loftus died in 1866, leaving him surviving his widow and three children, namely, John Henry, afterwards Marquis of Ely, George Herbert, afterwards Lord George Loftus, and Marian Loftus. There was also a son Adam who died in his father's lifetime, an infant. The Marquis of Ely was married, but there was as yet no issue of the marriage. Lord George Loftus married and had two children, who were minors, namely, John St. George, and Anne Mary Catherine. His wife was dead. Marian Loftus married Robert O'Brien Studdert, and died leaving her husband and two sons, namely, Thomas G. Herbert, and Loftus Adam, both of whom were of age. The Marquis of Ely had mortgaged his reversionary interest in the said sum of £20,000 to the present plaintiff A. W. Harris, who had recently obtained a decree in this Court for the sale of the Marquis' interest in the said sum. A question was raised in those proceedings by the conveyancing counsel of the Court whether the word "issue" in the direction to settle contained in the will should be construed as confined to children or whether it included remoter issue. This summons was then taken out by the plaintiff to have that question determined. Lady Adam Loftus, widow of Lord Adam Loftus, who was entitled to the income of the £20,000 for life, was still alive. Lord George Loftus and his two children, and also Robert O'Brien Studdert and his two sons were defendants.

O'Connor, *Q.C.* (with him, *Gaussen*), for the plaintiff:—

The word "issue" must be read as confined to children, and the construction put by the trustees on the clause in the will was correct. Here there is sufficient to control the ordinary meaning of the word, and to limit it to children. The testator's daughters were living at his decease, and it is unlikely that he intended to provide not only for them and their children, but also for their grandchildren, his own great-grandchildren, and that at a time when there were not even grandchildren in existence: see *In re Dixon's Trusts* (1); *In re Denis' Trusts* (2). In *Hobbs* v. *Tuthill* (3), the Master of the Rolls, held that in cases where there is no

(1) I. R. 3. Eq. 22; I. R. 4. Eq. 1. (2) I. R. 10 Eq. 81.
(3) [1895] 1 I. R. 115.

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explanatory context the word "issue" should receive its ordinary and established import and should not be confined to children. In the present case, however, there is an explanatory context which shows that the word was not used in its extended sense. The clause "and in case any of my said four daughters dying and leaving no lawful issue to attain the age of twenty-one years, or get married, then such share or shares of £20,000 old 3½ per cent. to be divided share and share alike between the survivors of my said four daughters" shows that the testator was thinking of children only of his daughters—the children of the marriage on which a settlement was to be executed. The trust is an executory trust to settle, and to settle on marriage strictly, the settlement must be read into the will, and the trustees have interpreted issue as meaning children. The strange result of the wider construction would be that the Marquis of Ely, instead of taking one-third would take only the same share as his nephews and niece, and Lord George Loftus would participate equally with his own children. If issue is construed "children" no such absurdity would result.

In *In re Denis' Trusts* (1), the Master of the Rolls (page 88), quotes from the judgment of Lord Redesdale in *Campbell* v. *Sandys* (2) (page 292), where he says, "The word 'issue' is ambiguous; it may mean either 'children,' or 'issue *in infinitum*': in the present case I think it impossible, upon the words 'to the issue of the said *John* and *Anne*,' not to say that the word 'issue' was used as synonymous to a child and was not meant to express issue indefinitely." The Master of the Rolls continues:—"This method of construction has the strong recommendation that it saves the plain intent of the settlement from being defeated by a technical rule. For can it be supposed that the parties could have intended this, that in case there should be not only children, but grandchildren, and even (for it is not impossible) great-grandchildren, all living when the period of distribution arrived, the whole three generations should be brought into line, and this pittance of £646 divided amongst them *per capita*." The same considerations apply to this case.

(1) I. R. 10 Eq. 81. (2) 1 Sch. & Lef. 281.

Garrett W. Walker, for the children of Marian Studdert:—

Where the word "issue" occurs in a will, it includes all descendants. The authorities cited are cases of settlements, and the words were "issue of the marriage." So far as the settlement here does not carry out the testator's direction it must be disregarded. There is a distinction between marriage articles intended to be followed by a settlement, and a will to be followed by a settlement. In a will an intention that words used are not intended in their ordinary sense must clearly appear on the document itself. Here the testator is his own conveyancer, the will is the settlement, and so far as technical words have been used they must have their technical meaning. In *Sackville-West* v. *Viscount Holmesdale* (1), Lord Hatherley, L.C., after referring to certain authorities says (page 555):—"These examples will suffice to show:—. . . . 4. That in the case of a will, or deed of gift, the intention that the very words mentioned in the instrument as proper for the more complete conveyance are not to be used must be plainly manifested by the first instrument, and will not be assumed merely because the trust is executory." The terms of the gift over do not affect the matter: *Sweetapple* v. *Bindon* (2). All the issue take *per capita*: *Davenport* v. *Hanbury* (3). In *Head* v. *Randall* (4) it was decided that although the word issue in the earlier part of the will meant children only, yet in a subsequent bequest, almost identical with that in the present case, it included remoter descendants. That is an express authority in favour of the extended meaning. *Hobbs* v. *Tuthill* (5), makes the law in Ireland, in reference to settlements identical with that of wills, and removes the difference between the English and Irish authorities. The will directs the fund to be settled on the issue share and share alike, and this direction would be carried out in framing a settlement: *Walter* v. *Parrott* (6). "Strictly" only means "to the exclusion of the husband."

Serjeant Campion, Q.C., for Robert O'Brien Studdert:—

Here the will contains a direction for a future settlement, and it must receive the same construction as marriage articles; more-

(1) L. R. 4 H. L. 543.
(2) 2 Vern. 536.
(3) 3 Ves. 257.
(4) 2 Y. & C. C. C. 231.
(5) [1895] 1 I. R. 115.
(6) 33 Ch. D. 274.

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over, the settlement is to be made on marriage, a vesting period is indicated, and the terms of the will are quite inconsistent with the extended meaning of the word "issue." *Head* v. *Randall* (1) was the principal case relied on in favour of the wide construction; but there the words of the will were very peculiar, and the later authorities do not bear out that decision. [Counsel then referred to *In re Handcock's Trusts* (2); *Hobbs* v. *Tuthill* (3); *In re Warren's Trusts* (4), and *In re Denis' Trusts* (5).]

Lawson, for the children of Lord George Loftus:—

It is admitted that the word "issue" in a will *prima facie* means descendants, and not children merely; but it is said:—1, that in marriage articles and in marriage settlements it has the more limited meaning of children; 2, that this will contemplates a settlement being made, and therefore it is in effect marriage articles, and that the word "issue" should receive the same limited meaning; 3, that on reading the will itself the Court should hold that "issue" means children, and reliance was placed on the gift over and the improbability of the testator intending to provide for grandchildren or great grandchildren. As to 1, the current of authority both in England and Ireland is against giving the limited meaning to the word "issue": *Leigh* v. *Norbury* (6); *Warren's Trusts* (4); *Hobbs* v. *Tuthill* (3); *Handcock's Trusts* (2). As to 2, no case has been cited in which in a will "issue" has been limited to children, unless explained by the context, or other indication of a contrary intention: *Davenport* v. *Hanbury* (7); *Freeman* v. *Parsley* (8); *Sibley* v. *Perry* (9); *Ralph* v. *Carrick* (10); *Re Harrison* (11). The fund was fully settled by the will, which the settlement merely repeats, substituting children for issue. As to 3, the gift over throws no light on the construction of the word "issue." The testator may have intended to provide for the

(1) 2 Y. & C. C. C. 231.
(2) 23 L. R. I. 34.
(3) [1895] 1 I. R. 115.
(4) 26 Ch. D. 208.
(5) I. R. 10 Eq. 81.
(6) 13 Ves 340.
(7) 3 Ves. 258.
(8) *Ibid.* 421.
(9) 7 Ves. 522.
(10) 11 Ch. D. 873.
(11) 3 L. R. Ir. 114.

grandchildren of his daughter living at her death. There is no context or other indication of a contrary intention to limit the meaning. It is not limited to the issue of a particular marriage, as is generally the case in a marriage settlement. *Head* v. *Randall* (1) is an authority in point. It is one of the reported cases on the construction of a direction in a will to settle a fund on a daughter and her issue. The testator there directed a proper and adequate settlement to be made upon his grand-daughters and their issue. Knight Bruce, V.C., says (2), referring to the word "issue": "Before I can restrain that word from its legal and proper import I must be satisfied that the contents of the will demonstrate the testator to have intended to use it in a restricted sense." He held that all the issue of Elizabeth Randall living at her death became entitled to the fund. Applying that here, the persons entitled would be the issue of Lady Adam Loftus living at her death. As she is alive, those persons cannot be ascertained, and the application to the Court is premature.

Stonor v. *Curwen* (3) and *Young* v. *Macintosh* (4) were also cases on the construction of a direction to settle in a will, and *Stanley* v. *Jackman* (5), in a deed, but the meaning of the word "issue" was restricted because of the context. There was no direction to divide equally, as here, which prevented the insertion of a power of appointment in the settlement: *Walter* v. *Parrott* (6).

Samuels, Q.C., for Lord George Loftus:—

The fund is to be settled on marriage "strictly": a settlement giving a son and his children equal shares would not be a strict settlement—it would be an eccentric one. On the construction contended for, Lord George Loftus would take only an equal share with his own children, and the class would have to be opened for grandchildren. In *Head* v. *Randall* (1) the will was one which on its face compelled the Court to give the extended meaning to "issue": moreover, it did not direct a settlement to be made on marriage, but that the legacy should be held *until*, if married, a settlement could be made. That was an exceptional case. "Issue"

(1) 2 Y. & C. C. C. 231.
(2) *Ibid.* p. 235.
(3) 5 Sim. 264.
(4) 13 Sim. 445.
(5) 23 Beav. 450.
(6) 33 Ch. D. 274.

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in marriage articles has frequently been held to mean "children": see *Thompson* v. *Simpson* (1). In *Stonor* v. *Curwen* (2), where "issue" was given an extended meaning, the context was quite different from that here.

O'Connor, Q.C., in reply:—

"Strictly" means that successive estates were to be limited as far as the rules against perpetuity would permit; that word is a guide to the true construction of the gift. The terms of the gift over show that the testator had in his mind children only; and a gift over, if no child attains twenty-one, or marries, is most usual in marriage settlements.

July 6.

THE VICE-CHANCELLOR:—

The question raised for decision in this case, is whether the word issue in the will of Robert Fannin includes descendants of all degrees living at the period of distribution, or is confined to children of the first taker. The testator bequeathed the sum of £20,000 *inter alia*, to trustees to be settled on his daughter Margaret, on her marriage, strictly on her, and on her demise, on her issue, share and share alike, not to be subject to the control or management of any husband she might marry, and in case of her dying and leaving no issue to attain the age of twenty-one years, or to be married, then such share of the £20,000 to be divided among the testator's other unmarried daughters.

The direction to settle this sum, in my opinion, amounts only to the preparing a formal settlement carrying out the trusts of the will, and does not authorize any departure from or variation of the rights of the parties intended to be provided for from those indicated by the will.

The general rule on this subject is that a gift to issue includes all descendants of any degree. The exception to it is, that if it appears upon the instrument of gift that the word was intended to be used in a limited sense so as to mean children only, it will be restricted accordingly. The onus of showing that such an intention existed lies upon the person alleging it. I am unable to find any words in the will of R. Fannin showing an intention to bring this

(1) 1 Dr. & War. 459. (2) 5 Sim. 264.

gift within the exception. The word "parents" is not used as coupled with issue or at all, and therefore the decisions in *Sibley* v. *Perry* (1) and the other cases of that class do not apply. The words lawful issue are not sufficient to confine the issue to children. The word child, or the word children is not to be found in the gifts of the sums of £20,000. If, therefore, the question were to be decided on the language of the will I should hold that there is nothing to prevent the ordinary rule from applying, namely, that issue is to be construed in the extended sense of descendants generally. But the argument of those in favour of the limited construction, is that where the occasion of the instrument in which the word issue occurs is the making a settlement upon marriage, this is in itself sufficient to restrict its meaning to the children of such marriage. This argument rests mainly, if not entirely, on the two cases of *In re Dixon's Trusts* (2) and *In re Denis' Trusts* (3), the former being a decision of the Court of Appeal in this country, and the latter a decision of the late Master of the Rolls, Sir E. Sullivan, following that in *In re Dixon's Trusts* (2). In the earlier case I was of opinion, and held that there is no distinction between wills and other instruments in this respect, and that where there is a limitation to, or a trust for, issue whether in a marriage settlement, marriage articles, or a will, the word issue, in the absence of words showing a different intention, should be given its legal meaning of descendants generally. My decision was reversed by the Court of Appeal, and whatever my opinion may still be on that subject, I am of course bound by the judgment of that Court. But it was further decided in those cases that in the case of provisions by any such instrument for the issue of a marriage, the word issue must on that ground, even alone, be deemed, in the absence of words of contrary intention, to mean children. I have still more difficulty in acquiescing in this view. I cannot see why it should be laid down as a rule of construction that in cases of provisions for marriage, the word issue should be restricted to children, on the assumption that remoter descendants are not to be deemed within the contemplation of the settlor. I am more disposed to agree with the views expressed by Pearson, J., that it is

(1) 7 Ves. 522. (2) I. R. 4 Eq. 1. (3) I. R. 10 Eq. 81.

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a common thing to give a power enabling the husband and wife to appoint to issue of the marriage remoter than children, if born within the proper limit of time. But whatever my opinion may be, I shall of course follow the decisions in the cases to which I have referred, and give fair effect to the principles there enunciated. No doubt there were expressions in those cases which were relied on by the learned Judges who decided them as supporting the construction they gave to the word issue, but I cannot refuse to apply those cases to the present in the absence of such expressions here. The Master of the Rolls stated in the clearest terms that the case of *In re Dixon's Trusts* (1) laid down a canon of construction which should be of general application, and which he not only followed, but in which he expressed his full concurrence. I cannot question his opinion that the language of the Lord Justice of Appeal showed that he meant to lay down such a canon, and to hold as a general rule that in instruments in the nature of marriage provisions, the occasion itself on which they were to operate affords ground, in the absence of expressions of a contrary intention, to hold that children only were to take.

I am of opinion that, assuming such a canon to exist, the will in this case comes within its operation, for it gives this sum of £20,000 only on marriage, and as to be settled on marriage, not only on the wife, but on the issue of the daughter marrying. Whatever, therefore, would be the decision on marriage articles must apply to the provisions for a marriage settlement contained in the will before me. The occasion in both is to make a provision by a settlement on marriage, and I see no ground for a distinction between the two. Therefore, feeling myself bound by the decisions to which I have referred, and being of opinion that they apply here, I must hold that issue should be restricted to children.

Solicitor for the plaintiff: *Harris.*

Solicitors for R. O'B. Studdert and his children: *Mac Mahon & Tweedy.*

Solicitor for Lord George Loftus and his children: *Weldon Molony.*

D. M'C. M.

(1) I. R. 4 Eq. 1.

WALSH *v.* JOHNSTON.

(1895. No. 502.)

V.-C.
1899.
June 7.
July 6.

Will—Construction—Gift of realty by husband to wife and issue of their marriage—Gift of realty and chattels to wife and issue—Estate tail.

A testator by his will bequeathed a certain farm of land [held in fee-simple] in the following terms:—"To my wife and *the issue of our marriage*"; and he also bequeathed to his wife and *issue* that part of his land, houses [also held in fee-simple] where he lived, viz. the public-house, offices attached thereto, also his cattle and chattel property, and also debts due to him, &c. Testator left surviving him his wife and one infant son born in his lifetime.

Held, that the words "of our marriage" had not the effect of taking the first gift out of the general rule of construction, applicable to wills, that issue, in the absence of a context showing a contrary intention, must be held to include all lineal descendants, and that therefore the widow took an estate tail in both gifts.

By his will, bearing date the 22nd March, 1890, Edward Johnston, of Inniskeen, in the county of Monaghan, made the following disposition of his property:—"I hereby give and bequeath unto my beloved wife Annie Johnston and *issue of our marriage* all my property, viz. the farm of land called properly the Inniskeen Glebe, and which farm I hold from the Land Commission, containing 38A. 1R. 14P. statute or 23A. 2R. 26P. Irish, at the yearly rent of (Church Temporalities a/c) £35 3*s.* 6*d.* Also I give and bequeath to my beloved wife Annie Johnston and *issue* that part of my land houses where I live or dwell, viz. the public house, offices attached hereto, also my cattle and chattel property, all debts due to me etc."

The testator died on 8th November, 1890, and probate of his will was granted to the Rev. John Francis Maguire, the sole executor named therein. He left surviving him his wife, Annie Johnston, and one infant son, Edward Johnston, born in his lifetime.

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At the time of his death the testator was possessed in fee-simple of the above-mentioned farm of land containing 38A. 0R. 35P., and the licensed house, known as the New House, with the yard and garden behind, and other houses and premises, situated in the townland of Inniskeen, and containing about 40¼ acres.

The present question arose in an action brought by a judgment mortgagee to have his mortgage declared well charged on the lands devised by the testator, and also to have it declared that on the true construction of his will the widow took an estate tail in the farm called Inniskeen Glebe, and not a tenancy in common with her infant son.

Oulton, for the plaintiff.

Donaldson, for the widow:—

Prima facie the word "issue" is a word of limitation. A gift of freeholds or personalty to a person and his issue creates a tenancy in tail in freeholds, and an absolute estate in personalty: *Sandes* v. *Cooke* (1); *Slater* v. *Dangerfield* (2): *Roddy* v. *Fitzgerald* (3). Two things are relied on to cut down the meaning of "issue" in the present will: first, the addition of the words "of our marriage," and secondly, the last clause consisting of a mixed gift of realty and personalty. The expression "issue of our marriage" can have no further effect than to create a tail special: *Platt* v. *Powles* (4). *Denis's Trusts* (5); *Dixon's Trusts* (6); have no application, as they are cases of marriage settlements or articles. Later authorities show that "issue" has not the signification there laid down without a special context: *In re Biron's Contract* (7); *Handcock's Trusts* (8); *Hobbs* v. *Tuthill* (9).

Chaytor, for the infant:—

There is ample context to show that the word "issue" must be construed as a word of purchase, coupled as it is with the words "of our marriage." Issue of marriage is equivalent to immediate off-

(1) 21 L. R. I. 445.
(2) 15 M. & W. 263.
(3) 6 H. L. C. 823.
(4) 2 M. & S. 65.
(5) Ir. R. 10 Eq. 81.
(6) Ir. R. 4 Eq. 1.
(7) 1 L. R. I. 258.
(8) 23 L. R. I. 34.
(9) [1895] 1 I. R. 115.

spring: see the judgment of Christian, L.J., in *Dixon's Trusts* (1), at p. 12, and also the dictum of Malins, V.C., in *Reed* v. *Braithwaite* (2), at p. 517. See also *Denis's Trusts* (3). In addition to this there is a gift of chattels to the wife and issue. Such a gift has been held to be a sufficient indication of intention on the part of a testator to restrict the meaning of the word "issue": *Grieve* v. *Grieve* (4).

Donaldson, in reply:—

In *Grieve* v. *Grieve* (4) the word used was "children," not issue.

THE VICE-CHANCELLOR:— July 6.

The questions to be decided arise on the will of Edward Johnston, by which he gave and bequeathed to his wife, the defendant Annie Johnston, and issue of their marriage, all his property, viz. a farm called properly the Inniskeen Glebe, held from the Land Commission. Also he gave and bequeathed to his wife and issue that part of his land, houses, where he lived, viz. the public-house, offices attached thereto, also his cattle and chattel property, and all debts due to him, &c.

He left his wife surviving him, and one infant child, the defendant Edward Johnston, who is stated, as it now appears erroneously, to have been born shortly after his death, but who was born in his lifetime.

The first question is what estate passed to his wife under the gift to her "and issue of our marriage" in the farm called Inniskeen Glebe; whether she took an estate tail in the whole, or whether she and her infant son took that farm as tenants in common, in equal shares for the entire estate of the testator. In the case of ordinary testamentary dispositions, there is no such aid to be deduced from the occasion of the gift, as has been held to apply to such a gift, where it is made on the occasion of marriage, assuming that the same words should be construed differently in the two cases. In dispositions by will the rule of construction is,

(1) Ir. R. 4 Eq. 1.
(2) L. R. 11 Eq. 514.
(3) Ir. R. 10 Eq. 81.
(4) L. R. 4 Eq. 180.

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that issue must be held to include all lineal descendants, and therefore it gives an estate in tail, or quasi-tail to the first taker, unless there are words in the context to cut down such a gift to children. The words "of our marriage" are relied on as having that effect here. But a gift to the issue of an existing marriage does not, in my opinion, take the gift out of the general rule. "Issue" necessarily implies lineal descent, and the addition of the words "and the issue of a particular marriage" merely confines the descendants to those of a specified husband and wife. A gift to A. and his or her issue includes all descendants of A. by any marriage, and the addition of the words of a particular marriage merely excludes issue by any other husband or wife. An estate tail may of course exist limited to heirs or issue of a particular marriage, and will include all the descendants of such husband and wife. The entail in such case would be special, while without such words it would be general; in either case it would be an estate tail. There are not any other words here which could in any way affect the construction of the words in question.

In the second gift, which is distinct from the first, there are not any words whatever to cut down issue to children.

I am therefore of opinion that under both those gifts the wife takes an estate tail in the respective subjects of gift.

Solicitor for the plaintiff: *Mac Mahon.*
Solicitor for the widow: *Macardle.*
Solicitor for the infant: *Baillie.*

J. MAC. M.

IN THE MATTER OF THE ESTATE OF JOHN CLELLAND AND SAMUEL SAUNDERS, OWNERS; REV. RICHARD WOLFE BAGOT AND ANOTHER, PETITIONERS.

Ross, J.
1899.
June 9.

Landlord and tenant—Land Purchase Acts—Redemption of annuity—Mode of calculation.

In calculating the redemption price of a perpetual annuity, from which poor rate and income tax had been hitherto deducted, the gross, and not the net, amount of the annuity should be the basis, and so many years purchase thereof allowed.

APPLICATION on behalf of petitioners having carriage of sale for an order that the perpetual annuity of £50, late Irish currency, equivalent to £46 3*s.* 1*d.*, sterling, created by the will of Christopher Bagot, deceased, dated 9th December, 1819, in favour of his daughter Emily, and her heirs and assigns, be redeemed, and that the redemption price of the said annuity be fixed by the Land Judge at £863.

The facts were shortly:—the annuity was charged on all the lands comprised in the absolute order for sale, and on no other lands. The rental of the estate was £189 17*s.* The largest portion of the estate had been sold under the 40th section, and the purchase money lodged in Court. The annuity was subject to deductions both for poor rate and income tax. Allowing 1*s.* 7*d.* as the average poor rate and 8*d.* as average income tax, there would be deducted in respect of poor rate £3 13*s.* and income tax £1 8*s.* 4*d.*, leaving £41 1*s.* 9*d.* as the yearly amount of the annuity. Twenty-one years purchase of this would produce £862 16*s.* 9*d.* The owners of the annuity consented to leave the value to the Judge.

Orpen, for the petitioners, having carriage:—

The request was issued in April, 1898, at which time the annuitant was liable to deductions for poor rate and income tax,

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and that is the date to which the rights of the annuitant are to be referred; twenty-one years purchase of the net amount is sufficient.

Drury, for the owner of the annuity :—

The calculation of the number of years' purchase should be made upon the gross amount of the annuity, and not upon the net. Since the passing of the Local Government (Ireland) Act of 1898, no deduction is to be made on foot of poor rate (see sect. 52 (2)), and the owner of the annuity should get the benefit of the statute. As to the proposed deduction of the income tax in arriving at the calculation, it should not be made. Were it deducted now, and the redemption money invested, income tax would be deducted from the income of the investment, and so the owner of the annuity would pay it twice over.

Ross, J. :—

The first question is as to the deduction of the poor rate, in arriving at the capitalized value of this annuity. Formerly the owner of the annuity had to submit to the deduction of £3 13*s.*, which will no longer be deducted. The owner of the annuity is richer by this sum of £3 13*s.* I think the redemption price is to be fixed on what is payable at the date the redemption is ordered. As to the £1 8*s.* 4*d.*, the income tax, I agree with Mr. Drury. If the capitalized value of the annuity were arrived at by deducting the income tax, and the sum then re-invested, income tax would be again payable. I therefore assess it at the gross sum. In this case twenty-one years' purchase is too little. I fix it at twenty-three years' purchase of £46 and allow the annuitant her costs.

Solicitors having carriage: *Orpen & Sweeny.*

Solicitors for the owner of the annuity: *Richardson & Synnott.*

W. C. S.

IN THE MATTER OF THE ESTATE OF DANIEL MONSARRATT AND ANNA LOUISA MONSARRATT, OWNERS; MARGARET GARDE, PETITIONER.

Ross, J.
1899.
July 14.

Landed Estates Court Conveyance—Mistake—Jurisdiction to execute supplemental Conveyance.

Where the Landed Estates Court Conveyance to a purchaser of a fee-farm grantee's interest contained no words of limitation or inheritance, the Land Judge directed a supplemental Conveyance to be prepared to remedy the omission.

APPLICATION on behalf of Abraham William Bate and Henry Reginald Bate, trustees, for the purposes of the Settled Land Act, of the will of William Casey Moroney, the purchaser of Lot 1 in this matter, for an order that a supplemental Conveyance might be ordered to be prepared, conveying to such trustees as aforesaid the full estate and interest in the said lot, purchased in this matter by the said William Casey Moroney on the 8th December, 1865, in order that the omission to convey to him by the deed poll of the 2nd July, 1866, an estate greater than one for his own life in the said premises might be rectified.

The facts were shortly as follows :—An absolute order for sale was made in this matter in 1864, and the estate was put up for sale in the ordinary way on the 8th December, 1865, and William Casey Moroney was declared the purchaser of Lot 1, which was held under a fee-farm grant; his name was entered in the Sale Book, he lodged the purchase-money to the credit of the matter, and obtained his conveyance dated the 2nd July, 1866. By some mistake this deed contained no *habendum*, and merely granted the lands to the purchaser without any words of limitation or of inheritance. This mistake was only recently discovered, when the tenant for life under the will of the purchaser was about to sell under the powers conferred by the Settled Land Acts, and trustees for the purpose of the Acts had been appointed by the Master of the Rolls.

Ross, J.
1899.

MONSARRAT'S ESTATE.

C. W. R. Brady applied for an order that a supplemental conveyance should be made to the trustees (as in Form No. 156 in the appendix of Forms and Precedents, Madden's Land Judges' Practice, p. 584), so as to acquire for the estate of the purchaser the entire interest purchased by him.

Ross, J. :—

I am satisfied that William Casey Moroney purchased the fee-simple, and that what he purchased was not conveyed to him by the Landed Estates Court Conveyance. I have already decided in *Toole's Estate* (1) where a man bought the fee-simple, and the Conveyance of 1879 had only the effect of vesting in him an estate for life, that the powers of the Court were not exhausted. In that case I executed a supplemental deed to take effect as if executed at the date of the purchase. Following that decision, I direct that a similar deed shall be prepared for execution in this case.

Solicitors for the applicant: *Webb, Scott & Seymour.*

W. C. S.

M. R.
1899.
Feb. 16.

GALWEY *v.* BARDEN.

(1899. No. 78.)

Will—Legacy—Bequest to legatee on condition of entering on a "calling"—Teacher in Jesuit college—Teaching carried on under control of the society—10 Geo. 4, c. 7, ss. 28, 34.

A testator by his will directed his trustees to hold his residuary estate in trust for his son J. until he should attain the age of 25, and provided that in case he should live to attain that age, and should before then have obtained a university degree, or should have become duly qualified to practise as a barrister, or solicitor, or doctor, &c., or should have obtained a commission in the army or navy, "or entered into any other profession, trade, or calling with the approbation of my trustees," then the residuary estate should be held

(1) Unreported.

in trust for him for the remainder of his life. There was a gift over in the event of J. dying before attaining the age of 25, or in the event of his attaining that age "without having obtained such degree, or qualification, or employment as aforesaid."

J. attained the age of 25. He had become a member of the Order of Jesuits, and was engaged in study, preparing for the priesthood. As a Jesuit he became a prefect of Stoneyhurst College; and under the control and direction of the order took part in the teaching and management of pupils in the college. In return for such services he was supported free of all charge. The trustees of the will approved of the course adopted by J. He never obtained a University degree.

Held, that J. having become a teacher in a Jesuit college had entered on a "calling" within the words of the will, and was entitled to the legacy.

ORIGINATING SUMMONS:—

By his will, dated 17th January, 1876, Edward Barden directed that the trustees therein mentioned should hold his residuary estate "in trust for my eldest son John Barden, until he shall attain the age of 25 years, and in case he shall live to attain that age and shall before then have obtained a degree in Arts or Science in some chartered University in the United Kingdom of Great Britain and Ireland, or shall have become duly qualified to practise as a barrister, solicitor, or attorney, or as a doctor of medicine, surgeon or licentiate apothecary, or as a civil engineer, or obtained a commission in the army or navy of the said United Kingdom, or entered into any other profession, trade, or calling, with the approbation of my trustees, then in trust for him for the remainder of his life, and after his decease, having attained the age of 25 years, or in case he shall die before he shall attain that age, or shall attain that age without having obtained such degree and qualification, commission, or employment as aforesaid, then I direct that upon the determination of my son's interest in said residue my trustees shall hold said residue in trust for all the children of my said eldest son who shall attain the age of 21 years, or if daughters shall marry under that age, to be divided between them if more than one, in equal shares, and in default of such issue of my said eldest son, then I direct that my trustees shall hold said residue and the income thereof in trust for my niece, Eileen Barden, &c."

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By a codicil to his will he provided as follows:—"I wish to recommend to my said executors and trustees the schools kept by the Jesuit Fathers in Ireland, particularly that situate at Tullabeg, near Tullamore, commonly called 'Tullabeg College,' which from being in connection with the London University, may hereafter be found most desirable and suitable for the education of my son."

Edward Barden died 10th January, 1880, and probate of his will and codicil was granted on 6th February following to Henry Lee and John Barden, a brother of the deceased, the executors and trustees named therein. Both these trustees having died, new trustees were duly appointed, in accordance with a provision contained in testator's will, by deed dated 11th July, 1881.

The testator's eldest son John Barden, on attaining 19 years of age, decided to join the Jesuit Order, with the view of becoming a Jesuit priest. He was received into the Order of Jesuits on 7th September, 1891, and from the time of such reception he engaged in studies to qualify him for priesthood in the Order. In 1893 he became a student at Stoneyhurst College, and in 1895, as a Jesuit, he became a prefect in the college, and from that time he continued to carry on duties, including the management of pupils and teaching, for which he received no remuneration, none being ever paid to any teacher or prefect who was a member of the Society, he being supported free of all charges by the fees paid by the students. On 22nd June, 1897, John Barden attained the age of 25 years. From the time of his admission to the Jesuit Order to the date of the present application he continued in a course of training for priesthood in the Order, and according to his evidence was prepared to take the vows necessary to attain the full *status* of a member of the Society of Jesuits. He had not obtained any degree in Arts or Science. The trustees of the will approved of the course adopted by John Barden in entering the Jesuit Order.

The question for the decision of the Court was whether under the trusts of the will of Edward Barden, his eldest son John Barden was entitled in the events which had happened to the income accruing since the date of the said John Barden attaining the age of 25 years upon the residuary estate of the testator.

Matheson, Q. C., and *Moloney*, for the trustees of the will.

O'Connor, Q.C., and *D. F. Browne*, for John Barden :—

John Barden, the eldest son of the testator, is entitled to the income accruing since he attained 25 years of age upon the residuary estate.

The mere fact that he has entered the Jesuit Order does not disentitle him to the benefits conferred on him by his father's will, if he has fulfilled the condition in the will.

He has, by joining the Jesuit Order, become a teacher and prefect in a public school. The carrying on or management of a school is a "calling": *Doe* v. *Keeling* (1); *Kemp* v. *Sober* (2). John Barden has therefore fulfilled the condition, and consequently became entitled to the provision made for him by the will, and the fact that he is a member of the Jesuit Order does not affect his right: *Bradshaw* v. *Jackman* (3).

The Right Hon. The Macdermot, Q.C., Ronan, Q.C., and *J. P. Butler*, for Eileen Barden :—

John Barden has not entered on any "calling," so as to entitle him under the terms of the will. The plain meaning is that he is not to take any benefit unless he has entered on such a "calling" as would qualify him for earning a livelihood and becoming a useful member of the community. He has become a Jesuit, and therefore the gift to him must fail. He is under the complete control of his superiors, and his employment under the Order is not a "calling" within the will.

Under 10 Geo. 4, c. 7, ss. 28, 34, the Order of Jesuits is an illegal Society, and John Barden, having entered into the Society, is guilty of a misdemeanour. The gift to him must be invalid: *Hogan* v. *Byrne* (4).

THE MASTER OF THE ROLLS :—

This question involves the construction of a provision contained in the testator's will. If the construction put on the will leads

(1) 1 M. & S. 95.
(2) 20 L. J. Ch. 602.
(3) 21 L. R. Ir. 12.
(4) 13 Ir. C. L. Rep. 166.

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to anything illegal, of course the result will be that the provision must fail.

We must first ascertain what the testator meant from the language he has used. He directs his trustees to hold the residue of his estate "in trust for my eldest son John Barden, now aged four years, until he shall attain the age of twenty-five years, and in case he shall live to attain that age, and shall before then have obtained a degree in arts or science in some chartered University in the United Kingdom of Great Britain and Ireland, or shall have become duly qualified to practise as a barrister, solicitor, or attorney, or as a doctor of medicine, surgeon, or licentiate apothecary, or as a civil engineer, or obtained a commission in the army or navy of the said United Kingdom, or entered into any other profession, trade, or calling, with the approbation of my trustees, then in trust for him for the remainder of his life." Then there is a gift over in the event of his dying before attaining the age of twenty-five, or attaining that age without having obtained "such degree and qualification, commission or employment, as aforesaid."

There is in this provision an enumeration of several things which would properly come within the definition of profession or calling; but it is not a case in which the principle *noscitur a sociis* applies, because there is no trade specified, though a trade would be a qualification as much as a profession. He is to obtain a University degree, or to become a barrister, or solicitor, or doctor, or surgeon, &c. None of these professions can be regarded as coming within the description of "trade," and the words of the will are "any other profession, trade, or calling"; and so the provision may extend to something outside the callings or professions enumerated, or those *ejusdem generis*, and the testator must have contemplated any trade if sanctioned by his trustees. The legatee in this case has not adopted any trade or possibly any profession within the meaning of the words of the will. The question whether he has entered upon any "calling" is what must be answered. That the calling is to be one adopted "with the approbation of my trustees" does not enlarge the meaning to be attributed to the words used, but rather restricts it. It is not merely a "calling" that is to be entered on, but a "calling with the approbation of the trustees." Nothing, however, now turns

on that, because the trustees have approved. But it is said that the legatee has not entered upon any calling so as to entitle him. The words may refer to the initial stage of entering upon a calling rather than having completely attained it, though this is not very clear. Dealing then with the matter as if it were not burdened with any consideration of illegality, if a person is engaged in study, preparing for the priesthood and waiting till he is ordained, may it not be said that he has *entered* upon a calling? The claimant in this case is a student at Stoneyhurst. He has been at the college since 1893. I have no doubt from his evidence that he is prepared to take the vows necessary to attain the full *status* of a member of the Society of Jesus, including those of poverty and obedience (which he mentioned); and that he is to be at the service of the Society. He has no doubt entered upon the work of the Order, and is under its superintendence, and direction. He seemed unwilling to give distinct answers to some of the questions put to him, at least he answered them with great hesitation; but I have no doubt, if this legacy becomes his, that he intends to dedicate the property to the use of the Society which the statute of Geo. 4 declares to be illegal; and that he will do so if he is not prevented. It may be, however, that the Society may allow him to dispose of it according to his own wishes, and it is legally open to him to leave the Society. It is not contended, however, that his adoption of membership of the Jesuit Order is a "calling" within the words of the will; but it is contended that he has entered upon the calling of a teacher. He has as a Jesuit become a prefect at Stoneyhurst College, and with his own consent, and as an incident of his membership, has taken a regular and systematic part in the teaching and management of pupils in the college, portion of his daily work being the instruction of classes in arithmetic and the rudiments of algebra, and in preparing students for special examinations: and these facts indicate that teaching is the principal object now immediately before him. He gets his living in return for his services as teacher. It is open to him to continue this if he becomes a priest. Many members of the Society are thus employed, and some distinguished Jesuits do carry on the profession of teaching as their life work. Then is the legacy left to him as a Jesuit? I think very clearly not. Or,

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is he not to have it, because as a private individual he happens to be a member of the Society? That cannot be the result. The profession of teaching is a calling, notwithstanding the fact that that teaching is carried on under the directions of a Society regarded by the law as an illegal organization.

As matter of construction, then, and looking at the words of the will, if the testator were now here to say what his wishes were as embodied in those words, could there be any doubt as to what explanation of them he would give? The use the legatee is to make of the legacy is not the thing the testator intended to provide for. So far as personal enjoyment is concerned, it was to be free, but conditional, in reference to vesting, on his living to attain twenty-five years, and entering upon some respectable calling in life. Take the codicil as supplemental to the provision in the will, in which he recommends the trustees, whom he appoints to be the guardians of his infant son, to select for his tuition the schools kept by the Jesuit Fathers in Ireland. Can it be imagined that the testator was so saturated with admiration for the Statute Geo. 4, that it was his intention that his son should not get the money if after being taught in a Jesuit school, he became a teacher in a Jesuit college? The son says that calling is the one which he prefers. I have no doubt that he has entered upon the calling of a teacher and that he has become entitled to the legacy. What he does with the money afterwards is his own concern.

Solicitor for the plaintiffs: *P. Kent.*
Solicitor for the defendant John Barden: *D. Purcell.*
Solicitor for the defendant Eileen Barden: *Kilkelly.*

R. W. L.

BARTON *to* IRVINE.

(1899. No. 689.)

V. C.
1899.
July 26.
Appeal.
Oct. 27.

Solicitor—Bill of costs—Solicitors Remuneration Act, 1881—*General Order*, 1884, *Rule* 2, *Schedule* 1, *Part I.—Mortgagee's solicitor—Scale fee—Bank mortgage—Future advances.*

The remuneration of solicitors by way of scale fee, as provided for by the the Solicitors Remuneration Act, 1881, Schedule 1, and the General Order thereunder, does not apply to work done as to securities for loans, which consist partly of present and partly of future posssible advances.

SUMMONS TO REVIEW TAXATION.

By indenture of mortgage dated the 5th January, 1897, Hugh Barton of Clonelly, in the county of Fermanagh, conveyed and assigned to the Belfast Banking Co., Limited, certain lands and hereditaments to secure all sums then due or thereafter to grow due, together with interest thereon. As is usual in the case of bank mortgages, the amount of the consideration money did not appear upon the face of the deed, which, however, bore a stamp sufficient to cover advances up to the sum of £3000.

It did not appear in evidence how much money was due at the date of the mortgage; but the entire sum of £3000 was advanced by the Bank before the bill of costs was furnished. In the bill of costs furnished to the mortgagor by his solicitor there was an item of £50, a sum calculated according to the scale fee, provided for by the Solicitors Remuneration Act, Schedule 1, Part I., and the General Order thereunder, as costs for the preparation and completion of the mortgage.

On taxation of costs the Taxing Master disallowed this item as solicitor and client costs; and in his report stated his reason for so doing as follows:—"I disallowed this item, as I did not consider that the scale fee under Part I., Schedule 1, of the Solicitors Remuneration Act applied to a transaction such as set

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BARTON to IRVINE.

out in the costs; but I offered to allow the solicitor a scale fee on any money paid over at the execution of the mortgage, or immediately thereafter; but he did not give me the particulars of the amount. But it was proved to me that the sum of £3000 was advanced on the mortgage. But I consider the solicitor would only be entitled to the scale fee on the sum advanced at the time or subsequent to the date of the mortgage."

The solicitor now applied to the Court for an order that the Taxing Master be directed to review his taxation by allowing the above-mentioned item.

Price, Q.C., for the applicant:—

The Solicitors Remuneration Act only requires that the mortgage should be a completed one. In the present case the moment the deed was executed the mortgagor was entitled to draw the full amount covered by the stamp on current account, and the solicitor having had the responsibility of preparing a mortgage to secure the sum of £3000 should be remunerated accordingly. As a matter of fact, the Taxing Master has found in the present case that the full sum secured has been advanced. *In re Bircham* (1) is distinguishable, inasmuch as the security in that case was given to cover advances on foot of debentures, which were never issued. The mortgage in that case was, therefore, not completed. In determining the applicability of the scale fee, the Taxing Master should only consider whether there is a completed mortgage, and whether a sum has been advanced on foot of it. [He also cited *D'Arcy* to *White* (2)].

Sugrue, for the mortgagor, resisted the application:—

No doubt *In re Bircham* (1) is not a case actually deciding the question; but we rely on the strong expression of opinion on the part of Lindley and Rigby, L.JJ., that the scale fee is inapplicable to securities for future advances (see pp. 796, 798).

THE VICE-CHANCELLOR:—

I concur in the decision of the Master of the Rolls in *D'Arcy* to *White* (1), that the scale fee is applicable to the case of a security

(1) [1895] 2 Ch. 786. (2) 31 L. R. I. 142.

for the loan of a sum of money, whether already advanced in whole or in part, or all advanced at the time the security for the advance is given. In that case the amount of the advance on which the scale fee is to be calculated would be capable of definite ascertainment at the time. But the question here is of a different nature, namely, whether the remuneration by way of scale fee applies to work done, as to securities for loans which consist partly of present advances and partly of future possible advances. Here there is an element of uncertainty introduced, which seems to me to render the application of the system of remuneration by way of scale fee impossible. It would be unfair to the solicitor to limit his remuneration to the amount of the actual advances present or past, for the transaction in itself contemplates further advances which would, when made, form portion of the loan. On the other hand such advances may never be made, and if made may be at different times and in separate sums, provided the whole does not exceed the prescribed limit, and it would seem unfair to measure the remuneration by the maximum sum specified. Suppose a sum of £500 was due at the time the security was given, or was then advanced, and the stamp was for £3000 to secure this and future advances not exceeding in all £3000; if the scale fee applied, the solicitor would receive remuneration as for £3000, when only £500 was actually advanced, and no more might ever be afterwards advanced. I am, therefore, of opinion that the scale fee does not apply to cases like the present, and that the remuneration must be ascertained on the former system of payment for work actually done.

I therefore hold that the solicitor should be remunerated, not according to the scale fee, but in the ordinary way, and I direct the Taxing Master to review his taxation accordingly.

I award no costs of the application.

J. MAC M.

Appeal. 1899.

BARTON *to* IRVINE.

Oct. 27.

The solicitor appealed (1).

Henry, Q.C., for the appellant.

Sullivan, Q.C., and *Sugrue*, for the respondent.

LORD ASHBOURNE, C. :—

I do not think that we have any doubt about this case, which involves an interesting point. It arises on a ruling of the Taxing Officer on the taxation of an item of a bill of costs as to whether the Solicitors' Remuneration Act applies to it. It is quite obvious that the Taxing Officer meant to give the solicitor the full measure of remuneration to which he was entitled, but he decided that the solicitor was not entitled to the scale fee which he claimed. The solicitor was not satisfied with the ruling of the Taxing Officer, and appealed to the Vice-Chancellor, who affirmed the ruling of the Taxing Officer.

The facts are these. It appears that Mr. Barton, a gentleman who dealt with the branch of the Belfast Bank in Enniskillen, found it desirable to give a mortgage to the bank to secure future advances. The mortgage on the face of it does not name any amount. The only way we can gather what the amount of it was to be is from the stamp. There was no obligation on the bank ever to advance 1*s.*, and if they had been asked to do so, after the execution of the deed, they might have refused. On the other hand, there was no obligation on the part of Mr. Barton to borrow 1*s.*; it was simply an arrangement between them that if he thought fit to borrow, and they were willing to lend up to the amount of the stamp, he might do so. Under these circumstances, speaking for myself, I can hardly think of a case more alien to the policy of the Solicitors' Remuneration Act. The policy of the Act was to enable the solicitor and client, instead of going through a number of items in a bill of costs, to name a certain rate of remuneration bulked according to the amount. In this case there might never be 1*s.* advanced, and it cannot, in my judgment, be

(1) In the Court of Appeal, before LORD ASHBOURNE, C., and FITZGIBBON, and HOLMES, L.JJ.

said that the Act applies to cases where the amount might never be advanced. I agree with the judgment of the Vice-Chancellor, as read to us by Mr. Henry. In my opinion the case is outside the Solicitors' Remuneration Act, and the remedy of the solicitor is to proceed by the ordinary mechanism, and to be paid the regular legal charges, which are not in controversy. In my opinion, the judgment of the Vice-Chancellor should be affirmed, and the appeal dismissed with costs.

FITZ GIBBON, L. J. :—

The schedules to the Orders made under the Solicitors' Remuneration Act do not purport to be universally applicable. To cases which are within the schedule of fees, the scale-rate of remuneration will apply; but the Act and Orders expressly provide that in cases not within the scale the solicitor's remuneration must be ascertained under the old system. Accordingly, we have to deal, in this appeal, with an effort by the appellant to bring the case within the schedule-scale, and if, in the judgment of the Court, he has not succeeded in doing that, the bill of costs must be made out and dealt with, and the solicitor's remuneration must be ascertained, under the old practice.

My ground for deciding that this case does not come within the scale is that the principle of ascertaining the remuneration under the scale is by a poundage on a certain sum. The policy of the Act was to provide for fixing a single liquidated sum for the cost of each particular piece of business included in the scale, instead of remunerating the solicitor by a number of small items.

Mr. Henry's argument for bringing a fluctuating sum within the scale might be advantageous to his client under the existing circumstances, but it might often be fatal to the solicitor's profession. The sum on which the poundage, if applicable, should be calculated must be a sum to be ascertained either at the execution of the deed, or at the date when the solicitor furnishes his bill, or at latest when he sues. A solicitor cannot recover costs by instalments. The amount of the costs must, in my opinion, be ascertainable when the solicitor's work is done, *i. e.* on the completion of the deed. If so, and if

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Fitz Gibbon, L.J.

Mr Henry is right, the scale poundage must be paid either on the highest amount which the mortgage can secure, or on the amount actually due when it is executed. The client cannot justly be made liable to pay costs by poundage on a sum which the transaction has never really covered; and if the other alternative be taken, banks and their customers have only to complete mortgages to cover current accounts, or future advances, when only some nominal or small sum, or nothing at all, is due, and give the solicitor the scale-minimum of £3 for the costs of a covering mortgage which may ultimately, or immediately afterwards, secure thousands of pounds. I reject both alternatives, and hold that a mortgage for an unascertained and unascertainable sum, is not within the scale, and remains to be paid for, as before, on a *quantum meruit* ascertainable under the old system.

In *Bircham's Case* (1) I cannot read the judgments as limited to deciding that the Act did not apply merely because the peculiar debentures in that case had not been issued, but the Judges seem to me to have held that the schedule does not apply to a deed which has not been so "*completed*" that a specific sum of money can be ascertained to be secured by it, so as to fix the principal sum on which the solicitor is to get his poundage. I agree with the Lord Chancellor in holding that the scale does not apply to a mortgage such as that in the present case.

HOLMES, L.J.

I concur; and I have little to add to the judgments already delivered. I am unable to see how a scale of charges based on a percentage calculated on the amount of the loan can be applicable to a case in which when the work is done, it is impossible to ascertain what the amount of the loan will be. Here there is no sum specified in the mortgage; it is given for the amount then due, or that may thereafter become due, from the mortgagor to the mortgagees. We may assume that, as the latter were the bankers of the former, the amount varied from month to month; and all we know about it is that when the costs were taxed, more than two years after the date of the deed, it amounted to £3000.

(1) [1895] 2 Ch. 786.

Where the General Order of 1884 provided a scale fee as the remuneration for all charges connected with the loan, including investigation of title and searches, and preparing, completing, and registering the deed, it contemplated that as soon as this work was done the solicitor would be entitled to receive, and the client would be at liberty to pay, what was due. This would be impossible in a case like the present, if the sum payable depended on the amount of the loan. It necessarily follows that the scale fee does not apply to a case of this kind, and that the solicitor's remuneration is to be ascertained according to the system applicable in the absence of a scale.

Solicitor for the appellant: *The Appellant in person.*
Solicitors for respondent: *J. Dunne & Son.*

R. D. M.

IN THE MATTER OF THE ESTATE OF WILLIAM STAWELL GARNETT, OWNER AND PETITIONER.

Land Judge's Court — Practice — Limited administration to substantiate proceedings.

The Land Judge will accept for the purpose of discharging a query on the title requiring plenary administration to be taken out to a deceased person, administration limited to substantiating the proceedings.

APPLICATION *ex parte* that notwithstanding the rulings on title and order of 31st July, 1884, the administration to George Charles Leslie Foster Garnett, and probate or administration with the will annexed of George Garnett need not be taken out until it should be ascertained if there shall be a residue available for the owners after payment of the incumbrancers; or in the alternative that the solicitors be at liberty to apply to the Court of Probate for limited administration to George Garnett and George Charles Leslie Foster Garnett, and that on same being lodged in this Court the queries in the title do stand discharged.

Ross, J. 1899. *In re* GARNETT'S ESTATE.

The facts were as follows:—The petition for sale was presented in November, 1878, by William Stawell Garnett, praying for the sale, amongst other lands, of Williamstown, otherwise Knockglass, in the county of Meath, part of which was held under a deed dated the 13th December, 1802, for the residue of a term of 500 years from 1814. The absolute order for sale was made on the 21st November, 1878. The title was lodged, and a ruling on the title was made that administration be taken out to George Charles Leslie Foster Garnett, who was a brother of the late owner and who died in 1855; and that the will of George Garnett, father of the late owner, who died in 1856, should be proved. The sale of the lands was by order of the 31st July, 1884, postponed until this ruling should be complied with. Sarah G. Garnett, by her will dated the 11th March, 1825, bequeathed certain real and freehold estates in the counties of Meath and Dublin, and all her other estates to John Schoales and Philip Smith upon trust to secure certain life annuities, now terminated; and as to the county Meath estate, in trust for and to the use of George Charles Garnett for life; then to the use of George Garnett (father of the owner), and after his decease to the use of the first and every other son of the said George Garnett, successively and in remainder according to priority of birth, and of the several and respective heirs male of the body or bodies of all and every of such sons lawfully issuing, the elder of such sons and his issue male to be preferred to and to take before the younger of such sons and his issue male, with divers remainders over. By a codicil, dated the 11th October, 1828, after reciting that she had purchased the mansion-house, garden, and orchard of Williamstown, being the lands included in the order for sale, the testatrix directed that any deficiency in her personal estate to meet certain pecuniary legacies given by her will should be made up out of the rents, issues, and profits of her lands, including those of Williamstown, and she settled the lands to the use of George Charles Garnett for life as in her will, with remainder to his issue, as in the said will was limited. The testatrix died on the 19th March, 1829, and George Charles Garnett died on the 24th November, 1841, whereupon George Garnett, his second son, entered into possession of the estates. In 1830, George Garnett married Catherine

Anne Stawell, and there was issue of that marriage George Foster Garnett (sometimes called George Charles Leslie Foster Garnett), William Stawell Garnett (the petitioner), and other children. In 1853, George Foster Garnett attained 21, and on 14th April, 1854, he executed a deed barring the estate tail in the lands; George Garnett, as protector of the settlement, refused to join; the deed was enrolled on the 25th May, 1854. George Charles Leslie Foster Garnett died in July, 1855, during the lifetime of his father, a bachelor and intestate, whereupon William Stawell Garnett became entitled to the estate tail in remainder in the devised real estate, subject to the life estate of George Garnett, and George Garnett became entitled as sole next-of-kin, to the residue of the term of years in Williamstown. No administration was taken out to George Foster Garnett. George Garnett made his will dated the 6th October, 1856, and thereby, after reciting that he was entitled to Williamstown as the sole next-of-kin of George Foster Garnett, the testator bequeathed all his interest therein to his son William Stawell Garnett. He died on the 8th October, 1856. His will was not proved. William Stawell Garnett attained age in 1859, and by deed enrolled he disentailed the real estate of which he was tenant in tail.

J. Herbert Shaw, on behalf of the petitioners:—

A similar order was made by Monroe, J., in *Moir's Estate* (1). The registrar of the Probate Division will make a grant to sub-

(1) The facts of this case were:—By a lease of the 10th July, 1858, the trustees and executors of T. Blacker demised to Henry Moir, father of Peter Moir, the lands of Kinneagh, for thirty-one years. Henry Moir died on the 20th January, 1868, intestate, leaving him surviving his widow, Peter Moir, and one other son. His widow died on the 17th February, 1878, intestate, leaving her two sons her next-of-kin. Peter Moir went into possession of the lands, surrendered them to the landlord, and got a new lease to himself for thirty-one years. He subsequently deposited this lease with the National Bank to secure advances. On the 24th March, 1884, the bank presented a petition for the sale of the lands, and the order for sale was made absolute on the 30th May. On the 5th January, 1887, an order was made for the issuing of a citation, returnable in six weeks, to accept or refuse letters of administration, and to be served on John Moir. The citation stated that the National Bank, Limited, "claimed to be entitled to a grant to substantiate proceedings in a certain matter now depending in the Land Judges' Division of this Court

Ross, J. 1899.

In re GARNETT'S ESTATE.

stantiate the proceedings, to a nominee of the creditors, upon the parties entitled in priority being cited and refusing.

Ross, J. :—

I give you liberty to apply to the Probate Division for limited administration to George Garnett and George Charles Leslie Foster Garnett, to substantiate the proceedings as regards the land in this Court.

Solicitors for the applicant: *Longfield, Kelly, & Armstrong.*

W. C. S.

in Ireland at Dublin, and entitled in the matter of the Estate of Peter Moir, Owner, the National Bank, Limited, Petitioners," and commanded the only next-of-kin of Henry Moir within six weeks to accept or refuse letters of administration. On the 4th March, 1887, letters of administration, limited to substantiate the proceedings, were granted.

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COMPULSORY PURCHASE—*continued.*
Provisional Order has been made and sanctioned by Act of Parliament. In 1895 an Act was passed confirming a Provisional Order authorising the Secretary of State for War to take certain lands in the neighbourhood of Londonderry for military purposes, and, in February, 1898, a notice to treat was served, and the other necessary steps were taken to have the amount of compensation to be paid for the lands ascertained by arbitration, pursuant to the said Act. The statutory notices were served on the occupier, and on the owner, who was tenant for life. In June, 1898, an action was brought against the arbitrator appointed by the Secretary of State for War and the tenant for life by the owners of the reversion in fee to restrain the arbitration proceedings on the ground of want of jurisdiction, the compulsory powers having, as they alleged, expired at the end of three years from the passing of the Military Lands Act, 1892, which they contended was the "Special Act." *Held*, that a literal construction could not be given to the words of the Military Lands Act, 1892, deeming it to be the "Special Act," and that the "Special Act" within the meaning of the Lands Clauses Act, 1845, sect. 123, was the Military Lands Act, 1892, together with the Act of 1895 confirming the Provisional Order made pursuant to the Act of 1892. *Hill* v. *Haire* - - - - M.R. 87

CONDITION IN WILL—*Legacy—Bequest to legatee on condition of entering on a "calling"—Teacher in Jesuit College—Teaching carried on under control of the society—*10 *Geo.* 4, *c.* 7, *ss.* 28, 34.] A testator by his will directed his trustees to hold his residuary estate in trust for his son *J* until he should attain the age of 25, and provided that in case he should live to attain that age, and should before then have obtained a university degree, or should have become duly qualified to practise as a barrister, or solicitor, or doctor, &c., or should have obtained a commission in the army or navy, "or entered into any other profession, trade, or calling with the approbation of my trustees," then the residuary estate should be held in trust for him for the remainder of his life. There was a gift over in the event of *J* dying before attaining the age of 25, or in the event of his attaining that age "without having obtained such degree, or qualification, or employment as aforesaid." *J* attained the age of 25. He had become a member of the Order of Jesuits, and was engaged in study, preparing for the priesthood. As a Jesuit he became a prefect of Stoneyhurst College; and under the control and direction of the Order took part in the teaching and management of pupils in the college. In return for such services he was supported free of all charge. The trustees of the will approved of the course adopted by *J*. He never obtained a university degree. *Held*, that *J*. having become a

CONDITION IN WILL—*continued.*
teacher in a Jesuit college had entered on a "calling" within the words of the will, and was entitled to the legacy. *Galwey* v. *Barden*.

[M.R. 508

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CONSENT—*Order staying action—Registration of order as a judgment—Irregularity—Practice.*] Where in an action a consent is received, and an order is made staying all further proceedings on the terms contained therein, such an order is not a judgment, or capable of being registered as such. *Joynt* v. *M'Cabe* - - - - V.-C. 104

CONSIDERATION FOR CONTRACT—*Covenant to pay annuity to third party—Action by third party and personal representative of covenantee—Right to enforce covenant.*] By deed made between *A* and *B*, *A*, who carried on business as a dentist, and *B* his son agreed to become partners as dentists for five years; a valuation was to be made of the furniture, instruments, &c., the property of *A* upon the premises where he carried on business; in the event of a dissolution *B* was to have the right to purchase that property at the amount of the valuation; and in the event of the death of *A* during the continuance of the partnership, *B* agreed to pay to his brothers and sisters certain annuities. *A* died within the five years, and *B* exercised his right of purchase. In an action

CONSIDERATION FOR CONTRACT—*continued.*
brought by the executors of *A*, and *B's* brothers and sisters, against *B*, to enforce payment of the annuities:—*Held*, that the plaintiffs were entitled to maintain the action. *Drimmie* v. *Davies* [V.-C. 176; App. 186

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2. —— *Design—Infringement—Penalties—Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 6, 11.] Plaintiff, as the owner of a design under the Copyright Act of 1862, brought an action for damages and penalties against *T. & Co.*, a firm who had inserted, without authority, the plaintiff's design as an advertisement in the two newspapers owned by the defendants in the present actions respectively, and also separate actions against these defendants claiming damages and penalties in respect of each copy of the newspapers which contained the advertisement as being an infringement of his copyright. The Master of the Rolls held the plaintiff entitled to damages, but not to

COPYRIGHT—*continued.*
penalties against *T. & Co.*, but finding as a fact that the owners of the newspapers had acted without bad faith or negligence, he dismissed the actions against them. No appeal was lodged against the judgment in the action against *T. & Co.*; but the plaintiff having appealed in the actions against the owners of the newspapers:—*Held* (Fitz Gibbon, L.J., *diss.*), reversing the decision of Porter, M.R., that the plaintiff was entitled to a penalty in respect of each copy of the newspapers containing the reproduction of the design, though the publication took place without bad faith or negligence. The penalty of one farthing was awarded in respect of each copy published. *Semble*: the plaintiff would have been entitled to penalties as well as damages against *T. & Co. Green* v. *Irish Independent Co.*; *Same* v. *Freeman's Journal Co.* - - - App. 386

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COVENANT AGAINST ALIENATION—*Landlord and tenant — Lease — Covenant against subletting without consent — Assignment without consent.*] A lease contained a covenant by the lessee not to set or demise the demised premises without the consent of the lessor. The lessee sold the premises, and the lessor gave his consent, which was indorsed on the assignment. The assignee Doyle then put the premises up for sale and O'Hara purchased them. O'Hara required the assignment to be made with the consent of the lessor. Doyle refused to obtain the lessor's consent, and the purchaser refused to complete:—*Held* (by the Master of the Rolls), on a summons under the Vendor and Purchaser Act, that, by the covenant, the assignee was restrained from assigning without the lessor's consent. *Held*, by the Court of Appeal (reversing the decision of the Master of the Rolls),

COVENANT AGAINST ALIENATION—*continued.*
that the covenant only restrained subletting without consent of the lessor, and that it was not necessary that the consent of the lessor should be obtained to make title. *Greenaway* v. *Adams* (12 Ves. 395) distinguished. *In re Doyle and O'Hara's Contract* - - - M.R. 113; APP. 118

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DAMAGES—*Measure of—Breach of contract—Sale of growing timber—Loss of profits.*] An action was brought for specific performance of an agreement for the sale of timber growing on the lands of the defendant, and an inquiry as to damages was directed at the hearing instead of a decree for specific performance. The plaintiff was a timber merchant, and the defendant was aware that the plaintiff bought the timber to dispose of in the ordinary way of his trade. It was shown that similar timber was not procurable in the market, and that the plaintiff would have realised a considerable profit on the sale of the timber. *Held*, that the measure of damages was the difference between the contract price of the timber *plus* the expenses which would be incurred in cutting, removing, and making it marketable, and the amount which the plaintiff would have realised by the sale of the timber. *M'Neill* v. *Richards* - - - - - - M. R. 79
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DRAINAGE WORKS—*continued.*
specified by award under the Act, and thereby charged on land in respect of expenditure for drainage or improvement thereof, provides that in certain events it shall be lawful for the Commissioners of Public Works, or any person authorised by them, to enter upon the lands and receive the rents and profits thereof; and that it shall be lawful for the Court of Chancery, upon the application by petition of the Commissioners, to appoint a receiver of the rents and profits; and that it shall be lawful for the Commissioners, if they shall so think fit, to raise the sum charged by mortgage of the land. Section 121, dealing with sums fixed as a maintenance rate, provides that the Commisioners and trustees, respectively, shall have the same powers, rights, and privileges, by entry or mortgage, to enforce the payment of such sums, as were given to the Commissioners for enforcing payment of sums charged under their award. In an action brought by trustees of a drainage district for the appointment of a receiver in respect of arrears of a maintenance rate:—*Held*, that there was jurisdiction to appoint such receiver. *Bole* v. *Smith* - - - - - V.-C. 374

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ESTATE FOR LIFE—*Vendor and purchaser—Sale of yearly tenancy—Will—Construction—Gift of chattels real to A for life, and at his decease "to his eldest son or heir-at-law."*] A testator devised and bequeathed his lands at *A* (held from year to year) to his son *J* for life, and at his decease to his eldest son or heir-at-law. *J*, who had gone into possession of the lands on his father's death, and had an eldest son living, agreed to sell the lands to *B*. *B* objected to the title on the ground that *A* took a life interest only under the will:—*Held*, that *J* took only a life estate in the lands, with remainder to his eldest son or heir-at-law as *persona designata*, and that therefore the vendor could not make title:—*Smith* v. *Butcher* (10 Ch. D. 113) followed. *In re Bishop and Richardson's Contract* - - M.R. 71

ESTATE PUR AUTRE VIE — *Devolution of estate—Special occupant—Intestacy.*] A lessee of lands which had been demised to the lessee, his heirs, executors, administrators, and assigns, for three lives or for thirty-one years, by his will devised the lands to the trustees in trust for *A B*, without any words of limitation in relation to either the legal or equitable interest. *A B* died

ESTATE PUR AUTRE VIE—*continued.*
intestate. One of the lives mentioned in the lease was still in existence. The term of years had long since expired. *Held* (affirming the decision of Porter, M.R.), that the heir-at-law, and not the personal representative of *A B*, was entitled to the estate *pur autre vie*. *In re King, deceased; King* v. *King* - - - - - - App. 30
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2. —— *Will—Gift of realty by husband to wife and issue of their marriage—Gift of realty and chattels to wife and issue.*] A testator by his will bequeathed a certain farm of land [held in fee-simple] in the following terms:—"To my wife and *the issue of our marriage*"; and he also bequeathed to his wife and *issue* that part of his land, houses [also held in fee-simple] where he lived, viz. the public-house, offices attached thereto, also his cattle and chattel property, and also debts due to him, &c. Testator left surviving him his wife and one infant son born in his lifetime. *Held*, that the words "of our marriage" had not the effect of taking the first gift out of the general rule of construction applicable to wills; that issue, in the absence of a context showing a contrary intention, must be held to include all lineal descendants, and that therefore the widow took an estate tail in both gifts. *Walsh* v. *Johnston* - - V.-C. 501

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EXECUTOR—*Administration—Assets of testator—Power of executors to carry on business—Right of executor to indemnity—Rights of creditors of testator*

EXECUTOR—*continued.*

and subsequent creditors of executors.] A testator's business was carried on for about two years after his death by his executors in accordance with a power in his will, and afterwards, by leave of the Court in an administration proceeding brought by the executors for their own protection, until the business was sold by order of the Court. Considerable liabilities were incurred by the executors in carrying on the business, and the assets were insufficient to pay both the creditors of the testator and the creditors of the executors. The creditors of the testator, who were chiefly members of his family, were aware that the business was being carried on, not for the purpose of selling it as a going concern, but in the hope of realizing a fund sufficient to pay them in full, and did not interfere:—*Held*, that the testator's creditors must be taken to have assented to the carrying on of the business, and that the executors were entitled, in priority to the testator's creditors, to be indemnified out of the assets in hand against the liabilities incurred by them in carrying on the business. *Dowse* v. *Gorton* ([1891] A. C. 190) and *Brooke* v. *Brooke* ([1894] 2 Ch. 600) followed and applied. *In re Hodges, deceased; Hodges* v. *Hodges* [M.R. 480

—— Of covenantee—Covenant for benefit of third party - - - - - 176, 186
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EXECUTOR DE SON TORT—Expired lease—Graft - - - - - - 463
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—— Shareholder - - - - - - 252
See SHARES IN PUBLIC COMPANY.

FUTURE ADVANCES—Mortgage to cover—Costs of mortgagee's solicitor—Solicitors Remuneration Act, 1881—Taxation
See TAXATION OF COSTS. 4. [515, 518

GRAFT—*Overholding tenant—Expiration of lease—Action to recover possession of land for non-payment of rent—Period of redemption expired—Receipt of money by evicted tenant on quitting the holding—Landlord and tenant—Judgment for possession—Non-joinder of party as plaintiff—Estoppel.*] *D*, the lessee of a farm held under a lease for three lives (of which *D* was the survivor) and an expired term of years, died in 1876 intestate, leaving a widow and nine children. After his death his widow remained in possession, and was accepted by the landlord as tenant from year to year of the farm, at the rate of £250. The farm was subject to a mortgage created by *D*. After the widow had been in possession of the farm for some years the rent was in arrear, and in April, 1886, an action to recover possession for non-payment of rent was commenced by *A* as landlord, there being then two and a half years rent due. On the 3rd May, 1886, Mrs. *D* gave a consent for judgment, and the writ of possession was executed on the 21st May. *B*, a neighbouring farmer, agreed to give the landlord £400 for the farm. On the 16th December, 1886, an interview took place at the office of the landlord's solicitor between Mrs. *D* and *B*, at which it was agreed that *B* should pay to the landlord £400, out of which Mrs. *D* was to receive £230. On the 15th January, 1887, an agreement between the landlord and *B* was filed pursuant to sect. 8, sub-sect. (6), of the Land Law Act, 1881, fixing the judicial rent of the holding at £250. Mrs. *D*. remained in possession until July, 1887, when she was put out under a magistrate's order. *W. H. D.*, one of the sons of the former tenant, who was a minor at the time of these transactions, brought an action against the specific legatee of *B.'s* interest and *B.'s* executors, claiming that Mrs. *D's* tenancy was a graft on the interest formerly held by her husband, and that *B.* having purchased her interest at (as alleged) a gross undervalue, his interest was a graft upon that of Mrs. *D*. *Held* (affirming the decision of the Master of the Rolls) 1, that the interest of Mrs. *D*. in the lands having been determined, either by the ejectment or by surrender, there could be no graft; 2, that even if the doctrine of graft applied the action was wrongly constituted, as the mortgagee and the landlord should both be paid before the plaintiff could succeed; 3, that *B* had not purchased Mrs. *D's* tenancy, but had obtained a new letting. Prior to, and at the time of, the action to recover possession, the reversion in the lands had been conveyed to two persons, *A* and *B*, on trust to collect the rents and manage the lands, one of whom only was plaintiff in that action:—*Held* that, no objection having been taken to the non-joinder of the second reversioner in the action to recover possession, the judgment in that action was not void; and that at all events, such an objection could not be relied upon by the plaintiff to sustain the present action. *Dempsey* v. *Ward* - - - APP. 463

2. —— *Renewable lease—Covenant—Construction—Purchase of reversion in fee by assignee of covenantor—Equitable right—Delay*—Laches.] A covenant by a middleman (whose lease contained a *toties quoties* covenant for renewal by his lessor) to renew a lease as often as his own lease is renewed, or any extended interest granted, does not bind a purchaser from the covenantor in respect of any further interest in the premises acquired by such purchaser. The fee-simple being conveyed to such purchaser is not affected by a covenant to which the fee in the hands of the vendor is not liable. Circumstances under which *laches* held to be a bar to an equitable claim. *Coey* v. *Pascoe* [M. R. 125

GUARANTEE DEPOSIT—Sale of to answer deficiency of income to meet annuity
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HEIR — Infant — Management of lands during minority — Conveyancing Act, 1881, s. 42 - - - - - - 337
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See POWER. 1.

HUSBAND AND WIFE — Dower — Bar of—Merger of estate - - 416, 435
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—— Will—Devise by husband to wife and issue of their marriage—Estate tail - 501
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IMPROVEMENT OF LAND ACT — Land Improvement Society — Agreement to make advances — Specific performance
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INDEMNITY—Executor carrying on trade 480
See EXECUTOR.

INFANT — *Accumulation — Maintenance — Jurisdiction to allow maintenance to infant "presumptively entitled" — Ability of father to maintain eldest son.*] A testator appointed real estates to his daughter for life, and after her death to her first and other sons successively in tail male, and provided that in the event of her marrying without her mother's consent the rents and profits should be accumulated by his trustees during the minority of her eldest son, and empowered them to apply the rents and profits in reduction of charges on the estate. By a subsequent clause in the will he empowered his trustees to apply any part of the annual income to which any object (being a minor) of the trusts already declared should be entitled or presumptively entitled towards the maintenance of such object. The daughter married without her mother's consent, and had two sons infants. An action was brought in the name of the eldest infant to administer the real and personal estate of the testator, and the rents and profits of the real estates, which were very large, were applied by the receiver in reduction of charges. The income of the infant's parents was considerable, but not sufficient to suitably maintain and educate him, having regard to the position in life which he would occupy on attaining his majority:—*Held*, that the trustees had power, notwithstanding the accumulation clause, to make an allowance by way of maintenance, and that, under the circumstances, it was a proper case for making the allowance asked for. *King-Harman v. Cayley* - - - - - - M. R. 39

2. —— *Management of land during minority — Appointment of trustees — Conveyancing Act*, 1881, *sect.* 42 — *Infant taking by descent.*] The provisions of sect. 42 of the Conveyancing Act, 1881, enabling the Court to appoint trustees on the application of the next friend of an infant, who is beneficially entitled to the possession of any land, include the case of an infant taking by descent. *In re Glover* - - - - - M. R. 337

INFRINGEMENT — Copyright — Damages — Penalties - - - - - 47, 386
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INJUNCTION—Breach of statutory conditions —Land Law (Ireland) Act, 1881, s. 5, sub-s. 6 248
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—— Building lease — Restrictive covenant — Change in character of neighbourhood
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—— Writ of summons—Service out of the jurisdiction - - - - - 217
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INSOLVENT ESTATE — Administration action—Manager—Priority of costs [69, 194
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INTESTACY — Descent—Infant taking by — Conveyancing Act, 1881, sect. 42 337
See INFANT. 2.

—— Devolution of title - - - 30
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—— Registration of judgment as mortgage against share of next-of-kin - - 1
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INTOXICATING LIQUORS—Sale of — Judicial tenant—Off license—Injunction [248
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I O U—*Donatio mortis causa* - - - 405
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IRREGULARITY — Registration of consent order as a judgment - - 104
See CONSENT.

ISSUE—*Will—Construction—Legacies to be settled on marriage on daughters, and on their demise on their issue—Issue read children.*] A testator bequeathed to each of his four unmarried daughters £10,000 New Government Stock, to be paid and assigned to each as a marriage portion on their respective marriages, and £20,000 Old Government Stock, to be settled on each marriage strictly on

ISSUE—*continued.*
his said daughters, and on their demise on their lawful issue, share and share alike, not to be subject to the control of any husband his daughters might marry, and in case of any of his said daughters dying and leaving no lawful issue to attain twenty-one or get married, then such share of old stock to be divided, share and share alike, between the survivors of his said four daughters:—*Held*, following *In re Dixon's Trusts* (I. R. 4 Eq. 1) and *In re Denis' Trusts* (I. R. 10 Eq. 81) that the word "issue" should be restricted to children. *Harris* v. *Loftus* - - - - - - V.-C. 491

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JUDGMENT — Market trustees — Receiver — Mortgage—Priority - - 229
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—— Order staying action on consent—Registration
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—— Registration as mortgage.
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JUDGMENT MORTGAGE—*Judgment against one of next-of-kin of intestate—Registration as mortgage against interest in intestate's chattels real—Invalidity of—Power of administrator to sell notwithstanding—13 & 14 Vict. c. 29.*] The right of a next-of-kin to a share of the personal estate of an intestate, consisting in whole or in part of chattel interests in lands, is not such an estate or interest in the lands as is capable of being attached by a judgment mortgage under 13 & 14 Vict. c. 29, sects. 6, 7. *In re Carolan and Scott's Contract* - - - - - - - V.-C. 1

2. —— *Principal and surety—Surety's right to all securities held by creditor — Mercantile Law Amendment Act — Mortgage security — Estate or interest in land—Judgment Mortgage Act.*] Although in cases where a creditor holds, as security for his debt, a mortgage on the lands of the principal debtor, a surety on paying off the debt is entitled to a transfer of the mortgage, yet, until an actual transfer to him of the security, or a judgment of a Court declaring him entitled to such transfer, he has no such estate or interest in the lands as would be affected by a registration of a judgment against him under the Judgment Mortgage Act. *Kennedy* v. *Campbell* - - - Kenny, J., 59

JUDICATURE ACT—Sect. 28 (8)—Receiver
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See Service out of the Jurisdiction.

JURISDICTION, LAND JUDGE—*Landed Estates Court conveyance—Mistake—Jurisdiction to execute supplemental conveyance.*] Where the Landed Estates court conveyance to a purchaser of a fee-farm grantee's interest contained no words of limitation or inheritance, the Land Judge directed a supplemental conveyance to be prepared to remedy the omission. *In re Monsarrat's Estate; Garde, Petitioner* - - - Ross, J., 507

LACHES. - - - - - - 125
See Graft. 2.

LANDED ESTATES COURT CONVEYANCE—Mistake in *habendum*—Jurisdiction to execute supplementary conveyance
See Jurisdiction, Land Judge. [507

LAND LAW (IRELAND) ACTS — *Land Law (Ireland) Act*, 1881, *sect.* 5, *sub-sect.* 6—*Prohibition against sale of intoxicating liquor on holding — Off-licence — Breach of statutory condition — Interlocutory injunction.*] The statutory condition contained in the Land Law (Ireland) Act, 1881, sect. 5, sub-sect. 6, prohibiting the tenant from opening on his holding, without the consent of his landlord, any house for the sale of intoxicating liquors, applies to a licence for the sale of liquors to be consumed off, as well as on, the premises; and an injunction will be granted to restrain him from so doing. *Richardson* v *Murphy* - - - - V.-C. 248

2. —— *Land Law (Ireland) Act* 1896, *sect.* 40 — *Request — Court tenant—Accelerating sale.*] The circumstance that an existing Court tenancy would probably expire before the estate would automatically appear in the Judge's list for consideration under the Land Law, Ireland, Act, 1896, s. 40, is not of itself a sufficient reason for accelerating the issue of a request. *In re Drake's Estate; Peart, Petitioner*
[Ross, J., 64; App. 65

—— Guarantee deposit—Sale to meet deficiency of income in payment of annuity — Practice, Land Judge - - 213
See Annuity. 1.

—— Notice of intention to sell — Election by landlord to purchase—Title 449, 456
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—— Redemption of annuity—Sale by Land Judge —Mode of calculation - - 505
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LANDLORD AND TENANT — Land Law (Ireland) Acts.
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—— Lease.
See Lease.

LANDS CLAUSES ACT — s. 123 — Time — "Special Act" — Military Lands Act, 1892 - - - - - - 87
See Compulsory Purchase.

LEASE — *For building purposes — Restrictive covenant—Purchase of reversion by lessee—Merger —Sub-lessees — Notice of restrictive covenant — Infringement — Change in the character of the neighbourhood — Waste — Injunction.*] By lease dated the 15th February, 1854, the Earl of *R.* demised certain lands near Belfast to *W. T.*, for the term of 1000 years at a yearly rent, and subject, among others, to a covenant on the part of the lessee to expend within three years a sum of £500, at least, in erecting a private dwelling-house on portion of the said demised premises, and a further covenant not to use or allow to be used any house then erected or thereafter to be erected on any part of the demised premises, save for a private dwelling-house or tea and refreshment house, without the consent in writing of the Earl of *R.* A sub-lease dated 25th December, 1863, was made by *W. T.* of a portion of these premises containing 2R. 23P., on which a villa residence had been erected called Seville Lodge, to Arabella *G.* (one of the defendants) for a term of 800 years, subject, however, to all the provisoes, clauses, covenants, and agreements contained in the original lease. All the estate and interest of *W. T.* became vested in *R. F.*, who in 1891 purchased the reversion in fee of the Earl of *R.* *R. F.* died in 1896; and the trustees of his will sold his interest in the premises to *A.* (the plaintiff). By a sub-lease dated the 9th Dec., 1896, portion of the premises comprised in the sub-lease of the 25th Dec., 1863, including Seville Lodge, passed into the occupation of *B.* and *C.* (the two other defendants). The sub-lease which was for a term of 750 years, excepted and reserved all such matters and things as were excepted and reserved in and by the lease of the 15th February, 1854, and was made subject to all the clauses, covenants, restrictions, reservations, and agreements therein contained so far as they affected the premises demised. Since the date of the original lease the character of the surrounding neighbourhood had completely changed through the extension of the municipal boundaries of Belfast; and on portion of the premises, adjoining those in occupation of *B.* and *C.*, the plaintiff herself had recently erected a number of small shops and dwelling-houses. The defendants *B.* and *C.* having commenced to excavate and remove the soil from the portion of the premises in their occupation, and to erect a large spirit grocery thereon:—*Held* (by the Court of Appeal, affirming the decision of the Vice-Chancellor), that the interest under the lease of the 15th February, 1854, had not become merged in the reversion in fee, so as to destroy the plaintiff's rights under the sub-lease of 25th December, 1863; that the defendants had express notice of the restrictive covenants contained in the lease of the 15th February, 1854, when they

LEASE—*continued.*

respectively acquired their interests in the premises, and were in equity bound by them; that the right of a person to enforce a restrictive covenant by injunction, could not be defeated by mere change in the character of the neighbourhood, unless there was an equity against him arising from his acts or conduct in sanctioning or knowingly permitting such change as to render it unjust for him to seek relief by injunction; that there was not sufficient evidence of such conduct on the part of the plaintiff, and that she was accordingly entitled to an injunction restraining the erection of the spirit grocery aforesaid: but *held* (by the Court of Appeal, varying on these points the judgment of the Vice-Chancellor), that this injunction should not go against Arabella *G.*; and that the plaintiff was not entitled to relief on the ground that the conduct of the defendants in altering the character of the premises demised as a villa residence amounted to waste. *Duke of Bedford* v. *The Trustees of the British Museum* (2 Myl. & K. 552), distinguished. *Craig* v. *Greer* [V.-C. 258; APP. 282

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—— Covenant to renew *toties quoties*—Purchaser from middleman—Acquisition of reversion
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LIMITED ADMINISTRATION — To substantiate proceedings — Practice, Land Judge - - - - - 521
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—— Unsuccessful action by—Sanction of Court—Realization of assets—Priority of costs
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MISTAKE—Landed Estates Court Conveyance—*Habendum*—Supplemental conveyance—Jurisdiction - - - - - 507
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MORTGAGE—*Market—Mortgage of tolls—Commissioners Clauses Act*, 1847 (10 *Vict.* c. 16) *s.* 75—*Priority—Receiver—Judgment in Queen's Bench Division—Sums received under equitable execution.*] The trustees of the Limerick market were empowered by local Act (15 Vict. c. civ.), with which was incorporated the clauses with respect to mortgages of the Commissioners Clauses Act, 1847, to raise money on mortgage of the rents and tolls of the market. By section 75 of the Commissioners Clauses Act the mortgagees were entitled to their respective proportions of the rates and assessments or other property comprised in such mortgages, according to the sums advanced, and to be repaid the sums advanced without any preference by reason of priority of advance or date of mortgage. The market trustees borrowed £20,000 secured by a mortgage deed in the ordinary form, with covenant for repayment. They also borrowed further sums secured by a series of mortgage deeds in the form prescribed in Schedule (B) to the Commissioners Clauses Act. Several of these mortgage deeds became the property of the plaintiff, and the mortgage for £20,000 became vested in an insurance society. The society brought an action in the Queen's Bench Division against the market trustees on the covenant in the mortgage deed, and recovered judgment, and obtained an order for a receiver by way of equitable execution over the tolls of the market, pursuant to which order the tolls were paid to them. Subsequently the plaintiff brought this action on behalf of himself and his co-mortgagees against the market trustees and the insurance society for an account, and for a receiver, and to have the priorities of the several mortgagees ascertained. *Held*, that the plaintiff and the other mortgagees were entitled to be paid *pari passu*, and that the insurance society were not entitled to retain the tolls paid to them under the receiver order in the Queen's Bench Division proceedings, although such order had been obtained before any proceedings were commenced by the plaintiff. *Usborne* v. *Limerick Market Trustees* - - - - - M.R. 229
—— Judgment—Share of next-of-kin. - 1
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—— Payment by surety—Mercantile Law Amendment Act—Judgment registered against surety's interest in mortgaged lands 59
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—— Payment of premiums on policy by *puisne* mortgagee—Salvage claim - 6, 12
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NOTICE—Restrictive covenant in lease
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NUISANCE—*Residential locality—Racecourse—Sunday racing—Disturbance of adjoining inhabitants—Interruption of Divine service—Obstruction of public thoroughfare — Injunction.*] Injunction granted to restrain horse races from being held on Sunday on a racecourse adjoining a residential locality, it being shown to the satisfaction of the Court that the quiet and comfortable enjoyment of their houses by the inhabitants in the neighbourhood was interfered with, and the services in churches in the locality interrupted, by the shouting and cheering of the crowds collected on the course and the cries of the bookmakers, and also that the public thoroughfares leading to the racecourse were obstructed by vehicles conveying persons to and from the races, and by vehicles drawn up near the racecourse waiting for fares. *Dewar and others* v. *City and Suburban Racecourse Co.* - - - - - - - V.-C. 345
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ORIGINATING SUMMONS—*Practice—Jurisdiction—Whether executors liable to account for income of third party received by testator—Question arising in the administration of the estate—Order LV., Rule* 4 (*g*).] *A* supported and took care of

ORIGINATING SUMMONS—*continued.*
B, an aged relative, for some years, during which time she received income of *B* to an amount exceeding the expenditure upon her. After the death of *A* and *B*:—*Held*, that the question, whether *A's* executors were bound to account to *B's* administrator for the income so received was not a question arising in the administration of the estate of *A* within Order LV., Rule 4 (*g*). *Herrick* v. *Cooper* - - - - - - - V.-C. 321

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—— Non-joinder—Action to recover possession—Objection by stranger after judgment
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PAYMENT INTO COURT—Amount of policy of insurance—59 & 60 Vict. c. 8, s. 3—Costs - - - - - - 6, 12
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PENALTY—Infringement of copyright 47, 386
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PERSONA DESIGNATA — Will — Bequest of chattel real - - - - 71
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POLICY OF INSURANCE — *Mortgage* — *Puisne mortgagee—Payments by the puisne mortgagee to keep up policy — Salvage claim — Paramount lien — Insurance Company — Lodgment of money in Court—Payment into Court Act*, 1896, (59 & 60 *Vict. c.* 8, *s.* 3)—*Costs.*] In 1872 the owner of two policies of assurance on her life mortgaged the same, along with an annuity and certain sums of money charged upon lands, to Mrs. *H.* to secure the sum of £1700. In 1877, *K.* who was the agent of the mortgagor and solicitor for mortgagor and mortgagee, took a puisne mortgage of the policies to secure some advances made by him, to the mortgagor. The lands on which the annuity and charges were secured were evicted for non-payment of rent and the policies thus became the only security for the loan. The mortgagor ceased paying the premiums on the policies, and the same were paid by K., who did not for some years inform Mrs. *H.* of the fact. In 1888 he wrote first saying, that he had been paying the premiums for her benefit, but not stating that he was himself a mortgagee. She replied, repudiating the idea that she had ever given him any authority to pay the premiums. *K.* answered that he had no objection to continue paying the premiums, and to be reimbursed for the same out of the policy moneys. Mrs. *H.* made no reply to this letter. The mortgagor died in the year 1896, and *K.* and his representatives continued paying the premiums down to her death. The Insurance

POLICY OF INSURANCE—*continued.*
Company paid the money into Court under the Payment into Court Act. *Held* by the Vice-Chancellor, that *K.* was entitled to a salvage claim or lien upon the policy moneys, in priority to Mrs. *H.'s* mortgage, for the premiums paid by him, and interest thereon:—*Held* by the Court of Appeal (varying the decision of the Vice-Chancellor), that *K.* was only entitled to a lien in such priority for the premiums paid by him, and interest thereon, after the date of the correspondence. *Leslie* v. *French* (23 Ch. D. 552), considered and discussed. *Held* by the Vice-Chancellor, that the Insurance Company was not entitled to any costs of lodging the money in Court under the Payment into Court Act 1896 (59 & 60 Vict. c. 8, s. 3). *In re Power's Policies* - - - - V.-C. 6; APP. 12

POOR LAW—Rates - - - - - 191
See TITHE RENTCHARGE.

PORTIONS—*Settlement—Construction— Expired term of years to raise portions—Intention to charge.*] By a post-nuptial settlement, dated in 1786, executed in pursuance of marriage articles dated in 1749, a term of years was created, the trusts of which were to raise a sum as portions for younger children. The term expired in 1892, at which time one of the portions had not been raised. The Judge, being of opinion that there was in the deeds no expressed intention to charge the portions independently of the term, nor any ambiguous expression from which such intention could be inferred:—*Held*, that the term having come to an end, the portion was not now raisable. *In re Marshall's Estate* - - - ROSS, J., 96

POWER—*Execution — Referential construction — Hotchpot clause.*] Decision of the Vice-Chancellor [1898] 1 I. R. 403 affirmed. *Hutchinson* v. *Tottenham* - - - - APP. 344

2 ——*Principles of construction— Will—Reading in words—Invalid appointment — Implied trust— "Empower"—"Blood relations" — Next-of-kin taking* per capita.] In construing wills it is the duty of the Court to ascertain, if it be possible, what the testator really meant from the language he has used. The exact words are not to be followed in their literal meaning if it be plain that to do so would frustrate the real intention of the testator. If, from a consideration of the whole will, it is plain that to place a literal meaning upon one clause would have the result of defeating the clear intention, it is necessary even to do violence to the language used. The thing to be ascertained is, what is the testator's will. After certain other dispositions of his residuary personal estate a testator provided as follows:—"I empower the survivor of them [the testator's two brothers] by deed or will to appoint the said personal estate to and amongst my blood relations in such shares and subject to such limitations as he

POWER—*continued.*

may think fit." There was no gift of the residue in default of appointment. *J.*, the surviving brother of the testator, who took a life interest in the residuary personal estate, by his will purported to make an appointment of the residue in favour of three cousins, having allocated merely nominal sums to the children of a deceased sister, a living sister, and her children. *Held*, that the appointment to the cousins being invalid, there was an implied gift in favour of the class who would have taken under an exercise of the power, and that the class entitled were the next-of-kin, who were to be ascertained at the date of the death of the tenant for life. *Held also*, that the objects of the power under the implied trust, in default of appointment, took in severalty and *per capita*. *In re Patterson, deceased*; *Dunlop* v. *Greer* M. R. 324

3. —— *Settlement containing no hotchpot clause—Assignment of share which object of power would be entitled to, in default of appointment—Release of, and subsequent exercise of power.*] By a settlement, dated in 1822, and executed upon the marriage of *R. M. S. M.* and *J. B.*, a term of 1000 years was created in trust to raise £10,000 for younger children of the marriage, in such shares as *R. M. S. M.* should by deed or will appoint, and in default of appointment to be equally divided among them, the sons taking a vested interest at twenty-one and the daughters at twenty-one or marriage. The settlement contained a declaration that if *R. M. S. M.* should advance any money or other property towards the provision or advancement in life of any of the younger children, such should be accounted in full or in part of such portion, and *R. M. S. M.* should have full power to appoint such sum or sums to such persons as he should think fit. The settlement did not contain any hotchpot clause. There were four younger children of the marriage, all of whom attained twenty-one, namely, *R. St. G. M.*, *M. A. N.*, *R. M.* (who died intestate and unmarried in 1869), and *J. R. L.* By a deed of the 4th August, 1858, £2500 was appointed to *R. St. G. M.*, and by a deed of the 14th September, 1865, £2500 was appointed to *M. A. N.* who was thereby excluded from any further participation in the fund. By a deed of the 17th September, 1870, reciting only the appointment to *M. A. N.*, *R. M. S. M.*, as personal representative of *R. M.*, assigned to *J. T. P.* the sum of £2500 to which *R. M.* was entitled, and *R. M. S. M.* and his eldest son covenanted to pay interest thereon. The deed contained covenants for title and further assurance by *R. M. S. M.*, and also a release by *R. M. S. M.* of £7500, the unappointed (as therein stated) portion of the £10,000, from the power of appointment. On the 1st November, 1871, *R. M. S. M.* appointed to *R. St. G. M.* £2494, of which

POWER—*continued.*

R. St. G. M. on the 12th May, 1877, declared a trust for *J. R. L.* By his will *R. M. S. M.* appointed £5 to *J. R. L.*:—*Held*, that the residue unappointed at the death of *R. M. S. M.* was divisible among the personal representatives of *R. M. S. M.* (as personal representative of *R. M.*), *R. St. G. M.* and *J. R. L.*, and that what passed under the assignment to *J. T. P.* was only one-third of this residue. *Held*, further, that the covenants for title and further assurance would not extend to include in *J. T. P.'s* security anything which *R. M. S. M.* might have acquired through advancements, or otherwise than as personal representative of *R. M.* *In re Mansergh's Estate*; *Pim, Petitioner* - - - Ross, J., 167

4. —— *Whether coupled with a trust — Fund bequeathed to trustees upon trust to pay the income to A. for life, with power to "demise" the fund to such of her brothers or sisters, or their children, as she should think proper—Power executed in favour of a niece, who predeceased the donee — Residuary gift.*] A testatrix bequeathed the sum of £3000 upon certain trusts, and, amongst others, upon trust to pay the interest on a sum of £500, part thereof, to her niece Rebecca, for life, or until she should be married, in which event she directed the said sum of £500 should be settled. The testatrix then declared the trusts of other portions of the £3000 in favour of her nieces Anne and Frances, and declared that it was her will and desire that her said nieces, or such of them as died unmarried, should have power to demise (*sic*) the above-mentioned legacies to such of their brothers and sisters, or their children, as she or they should think proper. The will contained a residuary gift to a sister of the testatrix. Rebecca died without having married. By her will she left the £500 so bequeathed to a sister who predeceased her. *Held*, that there was no trusts for the objects of the power, and that the sum of £500 fell into the residue. *In re Hall, deceased*; *Sheil* v. *Clark* [M. R. 308

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—— Consent staying proceedings — Order — Registration as judgment - - 104 *See* CONSENT.

—— Costs — Administration action — Manager appointed by Court—Priority - 69 *See* ADMINISTRATION ACTION. 1.

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SANITARY AUTHORITY — *Public Health Act (Ireland)*, 1878, *ss.* 2, 15, 17, 21, 24—*Drains—Sewers—Vesting of sewers in sanitary authorities—Use by sanitary authorities of sewer in adjoining district*—40 & 41 *Vict. c.* lxxxii., *ss.* 41–46—*Injunction.*] The plaintiff Commissioners were the sanitary authority of the Rathmines and Rathgar township, and were, by the 40 & 41 Vict. c. 82, constituted with the Rathmines and Pembroke Main Drainage Board into a joint Board for the construction of certain main sewers, and amongst others a certain outfall sewer for the drainage *inter alia* of the plaintiff Commissioners' township. The Act contained expressed prohibition against the use of any sewer, authorised by it and under the control of the plaintiffs, by any sanitary authorities or persons outside the limits of the Rathmines and Rathgar and Pembroke townships, unless they obtained a licence for the purpose from the plaintiffs. In an adjoining district of which the defendants were the sanitary authority, two squares were laid out early in the year 1897, containing a considerable number of houses, for the drainage of which the proprietors constructed two drains respectively, which were connected with an old county drain, that passed along a road in the defendants' district, and was primarily constructed by the Grand Jury merely to carry off the surface water of the road. The county drain at a certain point met and entered the outfall sewer belonging to the plaintiffs, so that the sewage matter from the squares eventually passed into it. The defendants had not obtained any licence from the plaintiffs for this use of their outfall sewer, and accordingly the plaintiffs, on the 13th of August 1897, served a notice on them requiring them to disconnect the sewers belonging to them that were discharging sewage matter into their outfall sewer. The defendants replied that no sewer belonging to them entered the system of the plaintiffs save that used for many years for surface drainage. The plaintiffs having brought an action to restrain the defendants from the acts complained of, or from any further acts that might be committed by them in the future whereby the sewage passing through the plaintiff's system should be increased:—*Held*, that the drains

SANITARY AUTHORITY—*continued.*
connecting the squares with the county drain, being common to more houses than one, fell within the definition of sewers contained in the Public Health (Ireland) Act, 1878, sect. 2, and, as such, once they were constructed, whether by the defendants themselves or other persons, became vested, by section 15, in the defendants as the sanitary authority of the district; that inasmuch as the sewage matter first passed through these sewers so vested in the defendants, it was immaterial whether it passed from them directly into the outfall sewer of the plaintiffs or indirectly through the medium of the county drain; and that consequently the plaintiffs were entitled to the relief sought for. *Rathmines and Rathgar Improvement Commissioners, and Rathmines and Pembroke Main Drainage Board* v. *Guardians of South Dublin Union* - - - - - - V.-C. 157

SERVICE OUT OF THE JURISDICTION —*Practice—Injunction—Anything to be done within jurisdiction—Person out of jurisdiction proper party to action properly brought against other person served within jurisdiction—Order XI., Rule* 1 (*g*), (*h*); *Rule* 2.] In an action against *M.*, a vendor of cycles within the jurisdiction, and *L. & F.*, cycle manufacturers in England, for an injunction to restrain the defendants from infringing in Ireland the plaintiffs' patent, and for damages, it appeared that *L. & F.* supplied *M.* with cycles having the article complained of as an infringement attached. The plaintiffs alleged that these cycles were sold by *M.* as agent for *L. & F.*, while *L. & F.* alleged that the cycles were sold by them to *M.* for resale by him. *L. & F.* also alleged that the plaintiffs' invention had been anticipated and was not novel. *M.* had been duly served with the writ within the jurisdiction:—*Held*, that the case came within both clause (*g*) and clause (*h*) of Order *XI.*, Rule 1, and that an order giving leave to issue a concurrent writ, and to serve it on *L. & F.* out of the jurisdiction, had been rightly made. *Joynt* v. *M'Crum* - - - - V.-C. 217

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SHARES IN PUBLIC COMPANY—*Death of shareholder—Unregistered assignee—Acts of ownership—Shareholder by estoppel—Executor de son tort—Liability for calls on shares.*] *J. C.*, sen., being the owner of certain shares in the plaintiff Company, shortly before his death assigned by deed all his property, including the shares, to his son *J. C.* (the present defendant), subject, however, to payment of his debts. The Company continued after the death of *J. C.*, sen., of which they alleged they had no notice, to address the usual shareholders' notices as before, namely, to "*J. C.*, Ballymoney," and the dividend warrants were drawn in favour of *J. C.* The defendant, in his evidence, admitted that he had received these dividend warrants, the first of which he endorsed as "*J. C.*, assignee of *J. C.*, sen.," but he alleged that he had devoted the proceeds to the payment of his father's debts. He further admitted that, since his father's death, he had attended a meeting of shareholders, and moved a resolution. He also stated that, after the meeting, he showed the deed of assignment to one of the directors, and asked to be registered as a shareholder, but that this request was refused on the ground that the deed did not comply with the articles of association. The Company made calls on the shares, which the defendant refused to pay. The present action having been instituted by the Company to recover the amount of the calls due on foot of the shares:—*Held*, that the Company were aware that the defendant was not the registered owner of the shares, and had themselves refused to register him as such; that, consequently, the defendant was not estopped by any conduct on his part from denying that he was a registered shareholder, and that therefore he could not be made personally liable for the payment of the calls; that as executor *de son tort* the defendant was also not liable for such payment *de bonis propriis*, but was only liable for the administration in due course of the assets that actually came to his hands. *Blackstaff Flax Spinning and Weaving Co.* v. *Cameron* - - - - - V.-C. 252

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SPECIFIC PERFORMANCE—*Land Improvement Act—Provisional Order for creation of rent-charge—Agreement to advance money for improvements—Action for breach of contract to pay instalments of loan.*] A Land Improvement Society (duly incorporated for making advances) agreed to advance to the owner of an estate £4000 for improvements on his lands, on condition of having assigned to them a Provisional Order from the Board of Works, under the Act of 1864, sanctioning the proposed expenditure for improvements, and, subject to the requirements of the Act, creating a rentcharge on the estate. The Board of Works sanctioned the loan, and the owner assigned the Provisional Order to the Society, who advanced to the owner £1500 on account of the loan by the specified instalments, but refused to make any further advances:—*Held*, that the owner was entitled to specific performance of his contract with the Society, the transaction being in substance a purchase by the Society of a rentcharge to be created in part by means of the purchase-money to be paid for it. *Gorringe* v. *Land Improvement Society* - - M. R. 142

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TAXATION OF COSTS — *Party and party—Settlement of statement of claim by senior counsel—Disallowance by Taxing Master — Practice.*] In an action for an injunction to compel the defendants to remove a certain wooden hoarding erected by them opposite the adjoining premises of the plaintiff in a public street, and which prevented him from having full access thereto, the plaintiff obtained judgment with costs. On taxation, the Taxing Master disallowed the plaintiff, as party and party costs, the costs of the settlement of the

TAXATION OF COSTS—*continued.*
statement of claim by senior counsel, and stated in his report his reason for so doing as follows:—"Party and party costs. Senior counsel not allowable, having allowed £2 2*s.* to junior counsel for settlement of claim" — *Held*, that the costs should be allowed, *M'Cann* v. *Newry Town Commissioners* - - - - V.-C. 342

2. —— *Party and party—Third counsel—Discretion of Taxing Master.*] The costs of a third counsel, as between party and party, should be allowed as a general rule, save under special circumstances, as where the case is of such small importance as to render the allowance unjustifiable. *M'Learn* v. *Cooke* - - - - - - V.-C. 66

3. —— *Party and party—Third counsel on motion —Report of judgment for use in Court of Appeal.*] In an action by a shareholder against directors for fraudulent misrepresentation in a prospectus, a motion was made by one of the defendants to set aside an order giving liberty to serve him with the writ out of the jurisdiction; the motion was refused by the Master of the Rolls with costs, and his order was affirmed by the Court of Appeal with costs. On the hearing of the motion in both Courts three counsel were briefed for the plaintiff. The plaintiff's solicitor obtained from the reporter to the Council of Law Reporting in Ireland a copy of the judgment of the Master of the Rolls, and paid him a fee of £2 2*s.* for it; he also prepared copies of the judgment for the use of the Judges of the Court of Appeal. The Taxing Master disallowed the costs of a third counsel; he also disallowed a portion of the amount paid for the report of the judgment on the ground that it could have been got cheaper from an ordinary short-hand writer, and he disallowed the costs of the copies for the Court of Appeal on the ground that it was the duty of appellant (the defendant), and not of the respondent (the plaintiff) to lodge copies for the use of the Court. *Held*, by the Master of the Rolls—(1) that on the taxation of the costs of an ordinary interlocutory motion the costs of not more than two counsel should be allowed, and that the discretion of the Taxing Master disallowing the costs of a third counsel should not be interfered with; but (2), that the reporter to the Council of Law Reporting was the proper person from whom to obtain a report of the judgment, and that the entire fee paid to him by the plaintiff's solicitor, and the charge for making copies for the use of the Court of Appeal should be allowed. *Bennett* v. *MacCabe* M. R. 107

4. —— *Solicitor and client—Solicitors Remuneration Act*, 1881 — *General Order*, 1884, *Rule* 2, *Schedule* 1, *Part I.* — *Mortgagee's solicitor — Scale fee — Bank mortgage — Future advances.*] The remuneration of solicitors by way of scale fee, as provided for by the Solicitors Remunerat

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Act, 1881, Schedule 1, and the General Order thereunder, does not apply to work done as to securities for loans, which consist partly of present and partly of future possible advances. *Barton* to *Irvine* - - - V.-C. 515; App. 518

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TITHE RENT CHARGE—*Deduction of poor-rate from*—1 & 2 *Vict. c.* 56, *s.* 76—61 & 62 *Vict. c.* 37.] (I.) Notwithstanding the relief granted to the payer of tithe rentcharge by the Local Government (Ireland) Act, 1898, in providing that the half poor-rate is not in the future to be deducted from rent paid to him, he can still, under 1 & 2 Vict. c. 56, sect. 76, deduct the whole of the poor-rate when paying tithe rentcharge to the owner thereof. (II.) In case of the redemption of tithe rentcharge, where an estate is sold to tenants in the Land Judge's Court, that Court is the proper tribunal to fix the redemption price. *In re Mundy's Estate*; *Holford, Petitioner* Ross, J., 191

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—— Power, whether coupled with — Will — Construction - - - - - 308
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TRUSTEE—*Will—Construction—Powers vested in two trustees to be exercised by one — Position of co-trustee.*] A testator devised and bequeathed his real and personal estate to his wife and eldest son on trust for sale, but with unlimited powers of postponing sale and of management meantime, and of paying legacies before the time specified in the will, and appointed his wife and eldest son executrix and executor. By a subsequent clause in his will the testator declared that, so long as his son should be a trustee of his will, all the powers vested in his trustees should be exercised by his son solely as if he were sole trustee, with complete power of management and of selling and buying and varying investments without the concurrence of or reference to his co-trustees:—*Held* (on an originating summons taken out to ascertain the opinion of the Court), that the effect of the clause was to vest in the son during his life the powers conferred on the trustees in the earlier clauses of the will as if he were sole trustee, so as to bind the widow to carry out his decisions arrived at in good faith, and that the clause was not inconsistent with the rest of the will, nor invalid nor void. *In re Arnott, deceased*; *Arnott* v. *Arnott* [M. R. 201

—— Drainage works—Recovery of maintenance rate—Trustees of Drainage District 374
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—— Infant taking by descent—Management of lands during minority — Conveyancing Act, 1881, s. 42 - - - 337
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